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ARTICLES

THE HEALTH EXCEPTION

MONICA E. EPPINGER*

ABSTRACT

The abortion doctrine laid out in Roe v. Wade permits a procedure necessary to preserve the life or the health of the pregnant woman, setting out what has come to be called the “life exception” and the “health exception.” This Article investigates the background and antecedents of the health exception, identifying three periods of formation and change up to the drafting of the Model Penal Code in 1959. It argues that theories of health lie at the heart of legal doctrine, shaping common-law treatment of abortion and persisting in nineteenth- and twentieth-century statutes. This account reveals origins of a health exception more robust and formative than previously understood and illuminates some of the otherwise puzzling formulations, distinctions, and legal categories that still shape abortion doctrine today.

INTRODUCTION: THE SEARCH FOR THE HEALTH EXCEPTION	666
I. HEALTH AT COMMON LAW	675
A. MEDIEVAL AND EARLY MODERN HEALTH	676
1. Humors and Humoral Balance	676
2. Warmth, Retained Matter, and Natural Purgation	678
3. Menstruation: First, a Means of Purgation	678
B. DIAGNOSING PREGNANCY, DETECTING LIFE	680
C. ABORTION: THEORY AND PRACTICE	682
1. Emmenagogues	683
2. Abortifacients	684
D. LAW	687
1. The Background of Medical Practice	687
2. Bracton: The Legality Distinction and the Precautionary Principle	689
3. Hale: The Curative Intent Distinction	692
4. Health on the Verge of Modernity	694
a. <i>Pre-Quickening: The Constructive Health Exception.</i>	694
b. <i>Post-Quickening: The Life-Health Defense</i>	695

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II. THE SHORT NINETEENTH CENTURY 697

 A. STATUS QUO ANTE: HEALTH, LIFE, ABORTION 698

 B. THE FIRST WAVE: REGULATION ENTERS STATUTE 701

 1. Statute in the U.K.: Ratifying Science, Criminalizing
 Abortion, Encoding Health Exception 701

 2. Statute in the United States: Protecting Patients 706

 a. *Poison and Consumer Protection* 706

 b. *Malpractice, Consumer Protection, and the Explicit
 Exception* 707

 C. THE SECOND WAVE: MEDICAL EDUCATION, HEALTH PRACTICE,
 AND SOCIETAL ANXIETY 710

 1. Formalizing Medical Education 710

 2. The Penny Press: Sensation, Surgery, and Stigma 714

 D. DOCTRINE: RAPID CHANGE AND FRACTURED UNIFORMITY 717

III. THE LONG TWENTIETH CENTURY 723

 A. HEALTH, LIFE, ABORTION IN THE LONG TWENTIETH CENTURY 723

 1. Persistence of Humoral Ideas and Practice 723

 2. The A.M.A. Campaign and Stifling Knowledge
 Transmission 724

 B. LAW 728

 1. The Imprint of Humoral Health 728

 2. The Implicit Health Exception 731

 3. The Explicit Health Exception 732

 C. HEALTH, REDEFINED 735

 1. The Century of Surgery 735

 2. Growing Gap between “Life” and “Health” 737

 3. “Health” Narrowed and Expanded 738

 4. Health Lost 742

CONCLUSION 742

INTRODUCTION: THE SEARCH FOR THE HEALTH EXCEPTION

In *Roe v. Wade*, the U.S. Supreme Court identified two “separate and distinct” interests that a State may invoke in regulating abortion¹: the wellbeing of the pregnant person and the potential human life of the fetus.² Throughout the Court’s holding, something called “maternal health” structures a regime of rules, each rule applying to a particular stage of pregnancy and triggered by a specified

1. *Roe v. Wade*, 410 U.S. 113, 162 (1973).

2. *Id.* (“[T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . and that it has still *another* important and legitimate interest in protecting the potentiality of human life.”).

condition which makes the State's interest "compelling."³ First, the "now-established medical fact" (circa 1973) that maternal mortality during the first three months of pregnancy was lower from abortion than from childbirth meant that before the end of the first trimester,⁴ the Court left an attending physician "free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated."⁵ Second, after the first trimester but before fetal "viability," the Court held the State could regulate abortion but only to the extent that such a regulation "reasonably relates to the preservation and protection of maternal health."⁶ Third, after a fetus became "viable," presumably capable of "meaningful life outside the mother's womb,"⁷ a State interested in protecting fetal life could "go so far as to proscribe abortion"⁸ except where "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."⁹ Thus, at its most restrictive, *Roe* set forth two exceptions, the "life exception" and the "health exception," in which the State's interest in the pregnant person was to prevail against any interest it might have in fetal life.

With this language, "maternal health" weighed as a state interest counterpoised with potential fetal life and the "health exception" became a linchpin of constitutional jurisprudence on abortion.¹⁰ Accordingly, since *Roe*, the health exception has become a lightning rod for subsequent challenges,¹¹ a perceived Achilles' heel for those trying to test the limits of *Roe* via statutory innovation,¹²

3. *Id.* at 162–63 (holding that the State's interests in the potential life of the fetus and the health of the pregnant person grow "in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling'"). While *Casey* disrupted *Roe*'s trimester framework, the figure of maternal health still weighs prominently in it and subsequent abortion jurisprudence. See *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992).

4. *Roe*, 410 U.S. at 163.

5. *Id.*

6. *Id.*

7. *Id.* at 163–64.

8. *Id.*

9. *Roe*, 410 U.S. at 165.

10. *Id.*; see also *Doe v. Bolton*, 410 U.S. 179 (1973) (invalidating provisions of restrictive Georgia law and giving woman's attending physician authority to decide a procedure's necessity for health).

11. See, e.g., *question presented in Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 844–45 (1992) (testing whether Pennsylvania Act's "medical emergency" exemption in three abortion-restrictive provisions sufficiently ensures the Act does not significantly threaten a woman's life or health); *Stenberg v. Carhart*, 530 U.S. 914, 929–30 (2000) (contesting the constitutionality of a statute criminalizing a particular abortion procedure without exception for health of the pregnant person); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328 (2006) (contesting the constitutionality of a parental notification statute generally lacking a health exception but allowing emergency abortion without parental notice when necessary to protect minor's health); *Gonzalez v. Carhart*, 550 U.S. 124, 161 (2007) (contesting the constitutionality of a statute barring a procedure without regard to medical judgment of its necessity for preserving pregnant woman's health).

12. See, e.g., *Partial Birth Abortion Act of 2003*, 18 U.S.C. § 1531 (fining or imprisoning any physician who knowingly performs a "partial-birth abortion," excepting only a procedure "necessary to save the life of a mother" from "a physical condition caused by or arising from the pregnancy itself . . ."), *contested in Carhart*, 550 U.S. 124; see also, e.g., *Pennsylvania Abortion Control Act* § 5,

and a matter of high anxiety both for supporters of women's autonomy¹³ and opponents of abortion.¹⁴ Surprisingly, though, despite its centrality to abortion doctrine¹⁵ and significance in legal challenges since *Roe*,¹⁶ the history of the health exception remains obscure.¹⁷ A flurry of scholarship over the fifteen years before *Roe* scrutinized the doctrine regarding so-called "therapeutic abortion," abortion performed for health-curative purposes, but none tackled its origins.¹⁸

1974 Pa. Laws No. 209 § 5 (codified as PA. STAT. ANN. tit. 35, § 6605(a) (1977)) (exposing physician to criminal liability for failure to employ specified abortion technique, so long as alternative is not necessary to preserve pregnant person's life or health), *contested in* Colautti v. Franklin, 439 U.S. 379 (1979); Pennsylvania Abortion Control Act of 1982 § 3210(b), 1982 Pa. Laws No. 138 § 3210(b) (codified as 18 PA. CONS. STAT. § 3210(b) (1982)), *contested in* Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (requiring physician to use procedure offering highest likelihood of aborting live fetus unless it presents "significantly greater" medical risk to patient's life or health); NEB. REV. STAT. ANN. § 28-328(1) (Supp. 1999) *contested in* Stenberg v. Carhart, 530 U.S. 914 (2000).

13. See, e.g., NARAL PRO-CHOICE AMERICA, ABORTION BANS WITHOUT EXCEPTIONS ENDANGER WOMEN'S HEALTH 2-3 (Jan. 1, 2015), <http://www.prochoiceamerica.org/media/fact-sheets/abortion-bans-no-exceptions-endanger-women.pdf> (press release noting that in *Carhart*, the Supreme Court "ominously . . . turned its back on *Roe*'s core holding safeguarding women's health"); cf. Judith Resnik & Reva Siegel, *Health Excepted, Health Accepted: Abortion, Health, and Law*, BALKINIZATION (Sept. 22, 2008, 6:40 AM), <http://balkin.blogspot.com/2008/09/health-excepted-health-accepted.html> (observing that under the *Roe* framework and around the world, "'health' offers reasons for regulation as well as for exemption from regulation" so that "every claim of health is itself a potential site of struggle"). For consideration of part of the post-*Roe* jurisprudence and its effect on women's autonomy, see, e.g., Jane Maslow Cohen, *A Jurisprudence of Doubt: Deliberative Autonomy and Abortion*, 3 COLUM. J. GENDER & L. 175 (1992) [hereinafter Cohen, *A Jurisprudence of Doubt*] (examining the effects of *Casey* on the analytic structure in *Roe* and on women's deliberative autonomy in regard to abortion).

14. See, e.g., *Current Abortion Law: General Principles*, MISSOURI RIGHT TO LIFE, (Dec. 10, 2000), <http://www.missourilife.org/law/genablaw.htm> (the "health exception" is the "exception that swallows the rule" and permits "infanticide"); see also, e.g., Americans United For Life, *Trojan Horse "Health" Exception Used To Strike Down Partial Birth Abortion Ban* (Sept. 8, 2004), on file with NARAL Pro-Choice America.

15. See *Roe*, 410 U.S. at 165; see also *supra* text accompanying notes 1-11; Mary Ziegler, *The Framing of a Right to Choose: Roe v. Wade and the Changing Debate on Abortion Law*, 27 L. & HIST. REV. 281, 282 (2007) (arguing the importance of public health, rather than rights-based, arguments in pre-*Roe* advocacy of abortion legalization); Yvonne Lindgren, *The Rhetoric of Choice: Restoring Healthcare to the Abortion Right*, 64 HASTINGS L. J. 385, 385 (2012-13) [hereinafter Lindgren, *Restoring Healthcare*] (arguing that the *Roe* holding "viewed abortion as a right inextricably linked to healthcare").

16. See, e.g., *Casey*, 505 U.S. 833; *Stenberg*, 530 U.S. 914; *Ayotte*, 546 U.S. 320 (upholding precedent that a State ban must except procedures to safeguard a woman's health); *Carhart*, 550 U.S. 124 (holding that Congress might omit a health exception after finding that a given abortion procedure is "never" medically necessary but leaving open the possibility of a facial challenge if an instance of medical necessity were to arise); see also Lindgren, *Restoring Healthcare*, *supra* note 15, at 391-403 (describing post-*Roe* abortion cases focused on health doctrine); Susan Frelich Appleton, *Doctors, Patients and the Constitution: A Theoretical Analysis of the Physician's Role in 'Private' Reproductive Decisions*, 63 WASH. U. L.Q. 183, 187 (1985) (concluding "at least in the abortion context, the Court's vision of privacy makes the doctor, not his patient, the centerpiece").

17. The historical recitation in *Roe* does not cover it. *Roe*, 410 U.S. at 129-147.

18. See, e.g., Herbert L. Packer and Ralph J. Gampell, *Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417 (1958-1959) (reporting results of an empirical study of doctors regarding perceptions of medical indication for abortion); Monroe Trout, *Therapeutic Abortion Laws Need Therapy*, 37 TEMP. L.Q. 172 (Winter 1964); James S. Bukes and William C. Hewson, *The Legal Status of Therapeutic Abortion*, 27 U. PITT. L. REV. 669 (1965-1966) (arguing that proposed Model Penal Code language, circa 1962, that lacked legal justification for therapeutic abortion, would improperly restrict the law compared

Historian Cyril Means, whose work¹⁹ convinced the *Roe* majority²⁰ that women traditionally enjoyed a common-law liberty to abort,²¹ did not provide an account either. Other works of legal history since *Roe*, including exceptionally thorough social histories of physicians' movements in the nineteenth century and the micropolitics of abortion-liberalization movements during the twentieth century, have also not focused specifically on the health exception itself nor provided an account of its origins.²² This Article addresses that gap.

Deciphering an Unfamiliar Past

In this Article, I trace the health exception and its antecedents through three periods: early-modern common-law, during which theories of health based on an

with the status quo); Zad Leavy and Jerome M. Kummer, *Abortion and the Population Crisis; Therapeutic Abortion and the Law; Some New Approaches*, 27 OHIO ST. L.J. 647 (1966) (contending abortion laws need to be reformed to bring them into line with widespread medical practice and to permit pregnancy termination by a physician for medical or humanitarian reasons). NB: The "health exception" has also been referred to as the "therapeutic exception," referring to abortion performed for health-curative purposes.

19. Cyril Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664–1968: A Case of Cessation of Constitutionality* (pt. 1), 14 N.Y.L.F. 411 (1968) [hereinafter Means, *Cessation of Constitutionality*]; Cyril Means, *The Phoenix of Abortional Freedom: Is a Penumbra or Ninth-Amendment Right About to Arise from the Nineteenth Century Legislative Ashes of a Fourteenth Century Common Law Liberty?*, 17 N.Y.L.F. 335 (1971) [hereinafter Means, *The Phoenix of Abortional Freedom*].

20. See *Roe*, 410 U.S. at 132–152 (citing Means, *Cessation of Constitutionality*, *supra* note 19; Means, *The Phoenix of Abortional Freedom*, *supra* note 19).

21. See *Roe*, 410 U.S. at 132 (citing Means, *Cessation of Constitutionality*, *supra* note 19, in concluding that "[i]t is undisputed that, at common law, abortion performed before 'quickening'—the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy—was not an indictable offense.").

22. Scholars have produced some excellent works of social history and historical sociology on abortion in the U.S., but none have made explaining the health exception and its origins a principal aim. See, e.g., DONALD T. CRITCHLOW, *INTENDED CONSEQUENCES: BIRTH CONTROL, ABORTION, AND THE FEDERAL GOVERNMENT IN MODERN AMERICA* (1999) (arguing that the abortion rationale in federal health programs between World War II and *Roe*—concern for population control more than for women's rights—affected abortion politics, coalitions, and policies after *Roe*); DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* (1994) [hereinafter GARROW, *LIBERTY AND SEXUALITY*] (detailing how abortion was provided and how abortion-law liberalization was debated from 1917–1972, with a focus on liberty and sexuality, privacy and birth control rather than ideas of health or origins of the health exception); KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD especially 30–31* (1984) [hereinafter LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD*] (tracing current polarized feelings on abortion to trajectories set in a nineteenth-century physicians' campaign that used opposition to abortion to establish perceptions of physicians' moral stature and technical expertise); JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800–1900* (1978) [hereinafter MOHR, *ABORTION IN AMERICA*] (describing practice and regulation of abortion, but not the ideas of health under which it was performed nor the earlier origins of the health exception); LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND THE LAW 1867–1973* (1997) [hereinafter REAGAN, *WHEN ABORTION WAS A CRIME*] (describing the practice of abortion after its statutory prohibition, including therapeutic abortion conducted legally under the health exception, but not focused on the origins of the health exception); see also *infra* text accompanying notes 33–35, 38–42 (distinguishing the approach, subject matter, and conclusions of this Article from prior works).

idea of the humors predominated;²³ the first half of the nineteenth century, a pivotal period of innovation;²⁴ and a period of reconsolidation in health theory and practice from 1857 until the drafting of the Model Penal Code (M.P.C.) in 1959²⁵ (which shaped debate over the last decade before *Roe*).²⁶ Delving into the completely unfamiliar regime of health that informed earlier periods during which legal doctrine was formed, this Article illuminates antecedents of the health exception and gives grounds to reassess our understanding of contemporary abortion doctrine more generally.²⁷

This past is a foreign country. Prenatal imaging and pregnancy tests did not exist before the 1930s.²⁸ Scientists still debated the exact duration of human gestation itself into the 1820s, and laypersons, even later.²⁹ Knowledge of sepsis

23. See *infra* Part I.

24. See *infra* Part II.

25. MODEL PENAL CODE §230.3 (1959, full draft of M.P.C. finalized 1962), reprinted in MELODY ROSE, ABORTION: A DOCUMENTARY AND REFERENCE GUIDE 38 (2008) [hereinafter ROSE, ABORTION DOCUMENTARY GUIDE].

26. See *infra* Part III.

27. See *infra* Part I. A–C.

28. In regard to prenatal imaging, see Ian Donald, J. MacVicar, & T.G. Brown, *Investigation of Abdominal Masses by Pulsed Ultrasound*, 1 LANCET 1188, 1188–95 (1958); Douglass H. Howry, *The Ultrasonic Visualization of Soft Tissue Structures and Disease Processes*, 40 J. LABORATORY & CLINICAL MED. 812, 812–13 (1952) (reporting Howry's discovery of the first means to produce tomographic images of human anatomy); see generally S. Campbell, *A Short History of Sonography in Obstetrics and Gynaecology*, FACTS, VIEWS & VISION IN OBGYN 213 (2013). In regard to pregnancy tests, see Harry E. Kaplan, M.D., *The Aschheim-Zondek Hormone Test for Pregnancy*, 3 CAL. & W. MED. 412, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1657279/?page=1> (reporting Selmar Aschheim and Bernhard Zondek's isolation of the hormone human chorionic gonadotropin, hCG, and development of the "A-Z Test," a test of injecting human urine in a mouse that could detect the presence of hCG); see also Marian D. Damewood, M.D. & John A. Rock, M.D., *In Memoriam: Georgeanna Seegar Jones, M.D.: Her Legacy Lives On*, 84 FERTILITY AND STERILITY 541 (Aug. 2005), <https://www.deepdyve.com/lp/elsevier/in-memoriam-georgeanna-seegar-jones-m-d-her-legacy-lives-on-JvDw1P3MuE> (reporting Jones' discovery around 1936 that hCG was produced by the placenta, rather than the pituitary as previously thought); Judith L. Vaitukaitis, Glenn Braunstein, & Griff Ross, *A Radioimmunoassay Which Specifically Measures Human Chorionic Gonadotropin in the Presence of Human Luteinizing Hormone*, 113 AM. J. OBSTETRICS GYNECOLOGY 751 (1972) (reporting their discovery of a test sensitive enough to detect a subunit of hCG only days after a missed period); Andrea Tone, *A Thin Blue Line: A History of the Pregnancy Test Kit*, 81 BULL. HIST. MED. 439 (2007) (in review of NIH exhibit, explaining the first FDA approval, in 1976, of a home pregnancy test); Office of NIH History, *A Thin Blue Line: The History of the Pregnancy Test Kit* (Sarah Leavitt curator, Dec. 3, 2003–present) <https://history.nih.gov/exhibits/thinblueline/>.

29. Karl Ernst von Baer discovered the mammalian ovum only in 1826. KARL ERNST VON BAER, ON THE GENESIS OF THE OVUM OF MAMMALS AND OF MAN 137 (Charles Donald O'Malley trans., 1956) (1827) (establishing that mammals develop from eggs). The human ovum was not given detailed description until Edgar Allen's work in 1928. Edgar Allen et al., *Recovery of Human Ova from the Uterine Tubes: Time of Ovulation in Menstrual Cycle*, 91 J. AM. MED. ASS'N 1018 (1928). In regard to the persistence of imprecise understandings of human gestation among laypeople, see for example *Joseph Hall, Judge of Probate etc. v. Hancock*, 32 Mass. (15 Pick.) 255, 257 (1834) (defense counsel opposing eligibility of after-born heir on grounds that gestation defies precise specification and for a given fetus can vary by up to several weeks).

in childbirth³⁰ and how to prevent it in gynecological procedures³¹ became widespread in the U.S. only by the last quarter of the nineteenth century, and antibiotics, by the 1930s.³² The sense of uncertainty—even unknowability—regarding what takes place inside a woman’s body and the dread risks of abnormal childbirth or surgical interventions to terminate pregnancy are hard for us to grasp, but they played a significant role in the experience of interrupted menstruation, pregnancy, and its alternatives in the past. Perhaps equally hard for us to grasp is that, in addition to what it lacked, the past had its own understandings and logics. Incorporating prior conceptions of health, including humoral doctrine, into the reading of legal history is where this Article departs from other histories of U.S. abortion law.³³ Reading legal doctrine across time demands that we engage a historical sensibility and suspend presentist assumptions about what, for people of a given time, even constituted the basic parameters of an experience or problem.³⁴

Regarding abortion, I categorize practices upon which women and their caregivers have relied as potional (meaning, primarily, ingested substances);³⁵

30. IGNAZ SEMMELWEIS, ETIOLOGY, CONCEPT, AND PROPHYLAXIS OF CHILDBED FEVER (K. Codell trans., 1983) (1861) (reporting Semmelweis’ 1847 discovery of sepsis as a cause of maternal mortality in childbirth, and doctor hand washing and other doctor disinfection measures as the key to its prevention).

31. Joseph Lister, *On the Antiseptic Principle in the Practice of Surgery*, 90 THE LANCET 353 (1867); Joseph Lister, *Of the Effects of the Antiseptic System of Treatment on the Salubrity of a Surgical Hospital*, 95 THE LANCET 4 (1870) (reporting the findings of Joseph and Agnes Lister’s experiments with antiseptics and their application to preventing infection from surgery).

32. Alexander K. Fleming, *On The Bacterial Action of the Cultures of a Penicillium, with Special Reference to their use in the Isolation of B. Influenza*, 10 BRIT. J. EXPERIMENTAL PATHOLOGY 226 (1929) (reporting Fleming’s 1927 discovery of antibiotics, in the form of penicillin).

33. See, e.g., MOHR, ABORTION IN AMERICA, *supra* note 22 (giving a detailed history of abortion law, but missing the theory of health under which abortion was performed); see also JOHN RIDDLE, CONTRACEPTION AND ABORTION FROM THE ANCIENT WORLD TO THE RENAISSANCE (1992) [hereinafter RIDDLE, ANCIENT ABORTION] (giving a thorough history of abortion practice, but deemphasizing contemporaneous theories of health).

34. This Article follows Monica H. Green’s endeavor “to explore medical systems of the past on their own terms. These societies saw a different body than we do, not necessarily because the physical body itself differed significantly, but because their intellectual structures of explanation and their social objectives in controlling the body differed. The task . . . is to reconstruct an image of the world that they saw, a sensation of the body as they experienced.” Monica H. Green, *Introduction* to THE TROTULA: AN ENGLISH TRANSLATION OF THE MEDIEVAL COMPENDIUM OF WOMEN’S MEDICINE 1, 20–21 (Monica H. Green ed. and trans., 2001) [hereinafter Green, *Introduction* to THE TROTULA]. For discussion of presentism more generally, see Michal Jan Rozbicki, *Intercultural Studies: The Methodological Contours of an Emerging Discipline*, in PERSPECTIVES ON INTERCULTURALITY: THE CONSTRUCTION OF MEANING IN RELATIONSHIPS OF DIFFERENCE 1, 14 (Michal Jan Rozbicki ed., 2015) (analogizing presentism to ethnocentricity, both cases of the “enormous power of taken-for-granted prejudgments over our attempts to reconstruct other people’s reality,” and in regard to presentism, warning against censuring people of past times for “not conforming to the values or ideology” of the present). For discussion of presentism functioning in a practice context, see for example Monica Eppinger, Karen Knopp & Annelise Riles, *Diplomacy and its Others*, 6 EWHA J. GENDER & L. 1, 11 (June 2014) (describing presentism in the practice of diplomacy).

35. See *infra* Part I.C.

external manipulation;³⁶ and internal intrusion.³⁷ Within each category, I identify different techniques specific to particular periods to understand precisely what practices were at issue in particular cases, legislative debates, and doctrines. More fundamentally, the milieu of knowledge and care within which techniques were developed, taught, and applied itself changes. The sociological context of care has been the recurring focus of histories of abortion in the United States.³⁸ One contribution of this Article is to look at shifts in ideas that drive, abet, or undermine changes in the sociological context of abortion practice. I am concerned with what is considered at stake for people of different times, the meanings they attach to health, health care, and abortion.³⁹

Many historical investigations into the conceptual background of abortion doctrine focus on “life” and its timing.⁴⁰ Particular details might be new, but the moves are familiar to us: changing senses of *when* human life begins mask a deeper set of ontological questions—*what* it means to be human, *what* is at stake at different points in development. We get that a secularization of understanding “the human” and its inception has taken place, and that theological debate has given way to scientific investigation. In other words, our time has equipped us to accept that understandings of “life” have changed or multiplied. In new questions about human life, we can see new grounds that have emerged for raising those questions and new apparatuses for providing answers.

This Article shifts the focus from life to health and foregrounds epistemology. The person seeking care faces her own set of questions, a multiplicity of ways of understanding what is happening in the present and what that means for the future. *What* is health; *when* is it vulnerable or *what* imperils it: behind these questions stand the fundamentally epistemic matters of *how* one understands, intuitively, inquires, conceptualizes, decides. Understanding the grounds from which such questions arise and the apparatuses from which acceptable answers may be generated requires an anthropology of knowledge, an inquiry into the “epistemic

36. See *infra* Part I.C.

37. See *infra* Part I.C.

38. For history of abortion in sociological context, see generally MOHR, ABORTION IN AMERICA, *supra* note 22; MARVIN OLASKY, ABORTION RITES: A SOCIAL HISTORY OF ABORTION IN AMERICA (1992); REAGAN, WHEN ABORTION WAS A CRIME, *supra* note 22. For parallel history in England, see for example JOHN KEOWN, ABORTION, DOCTORS, AND THE LAW: SOME ASPECTS OF LEGAL REGULATION OF ABORTION IN ENGLAND FROM 1803 TO 1982 (Charles Webster and Charles Rosenberg eds., 1988) [hereinafter KEOWN, ABORTION, DOCTORS, AND THE LAW].

39. Even recent scholarship undertaking a close reading of the health exception in Supreme Court jurisprudence since *Roe*, without inquiring into fundamental concepts of health, in my view puts the cart before the horse. See, e.g., Stephen G. Gilles, *Roe's Life-or-Health Exception: Self-Defense or Relative-Safety*, 85 NOTRE DAME L. REV. 525 (2009-2010).

40. See, e.g., John T. Noonan, *An Almost Absolute Value in History*, in THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES 51 (John T. Noonan, Jr. ed., 1970) (asserting “the most fundamental question involved in the long history of thought on abortion is: How do you determine the humanity of a being?”).

engagement of human beings with their environments.”⁴¹ That is the aim of the Article.

Throughout the periods under study, different kinds of knowledge—medicine, biological science, and human self-understanding—developed along their own trajectories. In each Part of this Article, I identify intersections of those trajectories that, I argue, prove dispositive to the emergence of a “health exception” doctrine. A few specific points prove significant in the development of the doctrine: shifts in accepted health theory and medical practice; emergent understandings of human ontology; and changing modes of knowledge production and patterns of diffusion.⁴² The interplay between these shifts has profound effects for what women do in relation to their bodies, what is considered at stake when they do, and when and why the law takes a stand in the name of health. Earlier ideas about health and life differ significantly from present-day ideas but are indispensable to understanding legal doctrine of our own time. Medical practices informed by past ideas might wane and the underlying health theory pass away, but legal doctrines formed in response to earlier practices and beliefs continue to sound in contemporary legal debate. Common law doctrines on abortion still referenced today are not properly legible to twenty-first century minds unless we understand underlying ideas of health and life and the practices they inspired.

Roadmap

Part I looks to medieval and early modern common law for evidence of a “health exception” doctrine, or its absence, and to uncover its antecedent logics.⁴³ To understand a “health exception,” we must first understand what earlier peoples meant by “health.” Part I describes prior health ideas⁴⁴ and then health practices,⁴⁵ arguing that under a humoral theory of health accepted in the United States through the nineteenth century, administering what would now be understood as an abortifacient could itself have been recognized as only, or primarily, therapeutic. Fundamental theories of health guided medical practitio-

41. Dominic Boyer, *Visiting an Anthropology of Knowledge: An Introduction*, 70 *ETHNOS: J. ANTHROPOLOGY* 141, 148 (2005), http://anthropology.rice.edu/uploadedFiles/People/Faculty_and_Staff_Profiles/Boyer_Documents/visiting%20knowledge.pdf; cf. LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD, *supra* note 22 (taking a sociology of knowledge approach—looking at knowledge in social context—rather than investigating the production and evolution of concepts and their co-constitutive interactions with social formations and power, which would be an aim of an anthropology of knowledge).

42. In other words, in understanding the history of the health exception, I argue that an important subtext is that modes of veridiction have shifted over time. On modes of veridiction, see Michel Foucault, *Les Quatres Modes de Véridiction Antiques* [The Four Modes of Ancient Veridiction], Lecture at the College de France, (Feb. 1, 1984), at YouTube <https://www.youtube.com/watch?v=b2ZFPNRXwPk>; see also Paul Rabinow, *Dewey and Foucault: What's the Problem?*, 11 *FOUCAULT STUD.* 11 (Feb. 2011), <http://raulicbs.dk/index.php/foucault-studies/article/viewFile/3202/3415>.

43. See *infra* Part I.

44. See *infra* Part I.A.

45. See *infra* Part I.C.

ners and patients to uterine purgatives; while a desire to avoid unwanted births might have been co-present (or not), any potion or manipulation to induce menstruation was underwritten by a health rationale.

Part I explains theories and practices prevalent in Europe and North America at least through the third quarter of the nineteenth century. This material supports the conclusion that, in performing what we would now consider abortion, health was not the exception, it was the rule. Part I explains that abortion to save the life of the mother was, by contrast, the exception⁴⁶: “saving life” entailed intervention later in pregnancy, increasing risk to the pregnant woman and rationally undertaken only if inaction posed a greater danger to her than intervention. Common-law abortion doctrine incorporated these background understandings. In it, the end of Part I reports, a “health exception” existed in two versions, one that I characterize as “the constructive health exception” and the other, as a “life-health exception” at a time when, in medical practice, life and health were inseparable.

The story changes after enactment of the first abortion statute (in Great Britain in 1803, in the U.S. in 1821).⁴⁷ Legislatures got involved in formulating abortion doctrine, producing three waves of statutes in the U.S. The first two occurred during a period of intense change that I refer to as “the short nineteenth century” running from 1820 to 1857, the subject of Part II.⁴⁸ Part II describes how the “health exception” entered statute, influenced by three parallel developments of this time. First, the increasing profile of science and the rise of professional men of medicine altered patterns of production and circulation of medical knowledge. Second, as midwifery waned and surgeons and commercial providers increasingly took over gynecological practice, “abortion” in the public mind became increasingly associated with intrusive measures. Third, underlying conceptions of health fundamentally began to shift away from humoral health.

Part III outlines a period of consolidation: of legislatures’ hold on regulating abortion, of formally trained physicians’ monopolization of women’s health care practice, and of adherence to new theories of health and disease. I refer to this period as “the long twentieth century,” pegging its inception at 1857 with the founding of the American Medical Association Committee on Criminal Abortion. Part III traces developments in biological science and breakthroughs in medical knowledge, as well as fundamental shifts regarding which traditions could speak truth about medicine; who practices medicine and how; and the parallel loss of a rich body of knowledge and practice of potional abortion. Finally, this Part

46. See *infra* Part I. C.

47. See, in the U.K., The Malicious Shooting Bill or Stabbing Act 1803, 43 Geo. 3 ch. 58 §§ 1, 2 (initiating modern statutory regulation of abortion) [hereinafter Lord Ellenborough’s Act], *reprinted at* https://en.wikisource.org/wiki/Lord_Ellenborough's_Act_1803; in the U.S., An Act Concerning Crimes and Punishments § 14, 1821 Conn. Rev. Pub. Laws tit. 22, §§ 14, 16 (codified at CONN. REV. STAT. tit. 22, §§ 14 at 152 (1821) (Connecticut legislative provision initiating statutory regulation of abortion in the U.S.)).

48. See *infra* Part II.

follows the implications for the “health exception”—during a time in which the grounds for the exception precipitously contracted and then unexpectedly expanded—until 1959 when the Model Penal Code proposed a standardized codification.⁴⁹

The debate over abortion writ large is often cast as a fetal right to life versus a woman’s right to choose.⁵⁰ This Article raises what it means to be healthy as an overlooked but dispositive background feature of the debate. The Conclusion synthesizes the overarching argument, that fundamental change in conceptions of health has remade the content and range of the “health exception,” even as law has preserved some of its earliest formulations.⁵¹

I. HEALTH AT COMMON LAW

Health, life, abortion: these are the three starting terms for our investigation. This Part takes on three tasks: to review conceptions of health dominant in early modern England⁵²; to use them to understand the backdrop of medicine and gynecological practice⁵³ against which formation and promulgation of common law doctrine took place; and then to revisit early modern legal doctrine concerning abortion and the health exception, bearing in mind the conceptual background of this time.⁵⁴ As this Part will show, ideas and practices from Mediterranean antiquity figure prominently in this history⁵⁵ for reasons specifically related to women’s health and with direct consequences for the practice and conceptualization of abortion. In particular, ideas from the Hippocratic tradition (fifth-second century B.C.)⁵⁶ and the physician Claudius Galen (129-199 A.D.)⁵⁷

49. See *infra* Part III.

50. See, e.g., P.G. Coffey, *Therapeutic Abortion*, 31 THE ADVOCATE (VANCOUVER BAR ASS’N), 99, 99 (1973) (“The argument about whether abortion is right or wrong is over the question of the foetus’ or unborn child’s claim to ‘life’”).

51. See *infra* Conclusion.

52. See *infra* Part I.A.

53. See *infra* Part I.B. and Part I.C.

54. See *infra* Part I.D.

55. On the influence of Hippocratic and Galenic thought in England even before the medieval or early modern periods, see for example RICHARD MARSDEN, *THE CAMBRIDGE OLD ENGLISH READER* 17 (2004) (explaining that much of the content of the four surviving major Old English medical treatises (from before 1100 A.D.) is translation of Latin works retransmitting the traditions of Hippocrates and Galen).

56. The Hippocratic tradition was established in a body of anonymous Greek writings from the fifth and fourth centuries B.C., eventually circulated together under the name of the physician Hippocrates of Cos (b. 460 B.C.). W.H.S. Jones, *General Introduction*, in HIPPOCRATES, HIPPOCRATES ix, xliii (W.H.S. Jones trans., 1979 (1923)). Hippocratic ideas about women’s health are conveyed to early modern Europe in two principal texts, *Diseases of Women I* and *Diseases of Women II*. Green, *Introduction* to THE TROTULA, *supra* note 34, at 15. For English translation of the Hippocratic treatise on women’s physiology, see HIPPOCRATES, *Nature of Women*, in 10 HIPPOCRATES 189 (Paul Potter ed. & trans., Loeb Classical Library 2012) (fifth century B.C.).

57. For biographical details and discussion of Galen’s ideas, see Peter Brain, *Galen and His System: An Introduction*, in PETER BRAIN, *GALEN ON BLOODLETTING: A STUDY OF THE ORIGINS, DEVELOPMENT, AND VALIDITY OF HIS OPINIONS, WITH A TRANSLATION OF THE THREE WORKS I* (Peter Brain ed. & trans., 1986) [hereinafter Brain, *Introduction to Galen*]. On Galen’s influence on medieval medicine and the

are key. Through a formative period of the common law—encompassing the time of Bracton’s treatise *On the Laws and Customs of England* (1210–1268)⁵⁸ through the time of Sir Edward Coke (1628–1644),⁵⁹ Sir Matthew Hale (d. 1676),⁶⁰ and beyond⁶¹—Hippocratic-Galenic theories served as the taken-for-granted background of health practice.⁶² It is to them that we turn first.

A. MEDIEVAL AND EARLY MODERN HEALTH

1. Humors and Humoral Balance

In the Hippocratic-Galenic theories that came to dominate in Europe, good health depends on maintaining a correct balance of certain “humors” (manifest in

development of early modern gynecology, see Green, *Introduction to THE TROTULA*, *supra* note 34, at 18–25. For three of Galen’s works in English translation, see PETER BRAIN, *GALEN ON BLOODLETTING: A STUDY OF THE ORIGINS, DEVELOPMENT, AND VALIDITY OF HIS OPINIONS, WITH A TRANSLATION OF THE THREE WORKS* 15 (Peter Brain ed. & trans., 1986) (second century A.D.) [hereinafter *GALEN, ON BLOODLETTING*].

58. HENRI DE BRACTON, 2 *ON THE LAWS AND CUSTOMS OF ENGLAND* (George Woodbine Latin text, Samuel E. Thorne trans., 1968–1977) (1210–1268), <http://bracton.law.harvard.edu/Unframed/English/v2/340.htm> [hereinafter *BRACTON, LAWS AND CUSTOMS OF ENGLAND*]; see also *infra* Part I.D.2 (describing Bracton’s liability and rescue doctrines).

59. SIR EDWARD COKE, *A FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* (W. Clarke & Sons ed. 1817) (1628–1644), <https://books.google.com/books?id=S2w0AQAAAMAJ&pg=PA251&lpg=PA251&dq=3+E.+3+Coron.+163&source=bl&ots=LTVhC9Lv0w&sig=o9JxlE9G25vntYsGXg7wB3kg1fg&hl=en&sa=X&ei=91zhVMAVhKmDBMKwhIAP&ved=0CBQQ6AEwAA#v=onepage&q=3%20E.%203%20Coron.%20163&f=false> [hereinafter *COKE, LAWS OF ENGLAND FOURTH*].

60. 1 SIR MATTHEW HALE, *HISTORY OF PLEAS OF THE CROWN: OR A METHODOICAL SUMMARY OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT* (1736) (1682), [hereinafter *HALE, PLEAS OF THE CROWN*], reprinted at <https://archive.org/details/historiaplacitor01hale>; see also *infra* Part I.D.3 (describing Hale’s intent doctrine).

61. See *infra* Part II (discussing the persistence of these ideas and practices into the nineteenth century and challenges to them that arise over the century).

62. For evidence of gynecological practice and its background in medieval treatises that circulated through early modern times, see for example *THE TROTULA: AN ENGLISH TRANSLATION OF THE MEDIEVAL COMPENDIUM OF WOMEN’S MEDICINE* (Monica H. Green ed. and trans., 2002) (twelfth century) [hereinafter *THE TROTULA*]; see also HILDEGARD OF BINGEN, *HOLISTIC HEALING* (Manfred Pawlik trans. Latin-German, 1989; Patrick Madigan, S.J. trans. German-English; Mary Palmquist & John Kulas, O.S.B. eds. of English text, 1994) (1151–1158) [hereinafter *HILDEGARD OF BINGEN, HEALING*]. On the particular prominence of the *Trotula* and Hildegard’s work in medieval and early modern health practice, see HILDEGARD OF BINGEN, *HEALING*, *id.*, at 72 (with the *Trotula*, Hildegard’s work is the most consulted handbook on women’s health in medieval Europe); Green, *Introduction to THE TROTULA*, *supra* note 34, at 2; *id.*, at 60 (explaining the *Trotula* informs medieval practice from “Italy to Ireland, from Spain to Poland”); Monica H. Green, *Obstetrical and Gynecological Texts in Middle English*, 14 *STUD. AGE CHAUCER* 53–88 (1992) (explaining five of the ten gynecological texts in Middle English are renditions of the *Trotula*). For a sixteenth-century example of Galenism in thinking about health, see for example JEAN FERNEL, *THE “PHYSIOLOGIA” OF JEAN FERNEL* (John M. Forrester & John Henry eds. and trans., Am. Phil. Soc’y 2003) (1567) [hereinafter *“PHYSIOLOGIA” OF JEAN FERNEL*]; see also John Henry & John M. Forrester, *Introduction*, in *THE “PHYSIOLOGIA” OF JEAN FERNEL*, 1, 1, 4–5, 8 (John M. Forrester & John Henry eds. and trans., Am. Phil. Soc’y 2003) [hereinafter *Henry & Forrester, Introduction to FERNEL*] (describing Fernel’s “Physiologia” as the fullest exposition of Renaissance Galenism, representing the “high-water mark of European Galenism”).

the bodily fluids of blood, phlegm, yellow bile, and black bile)⁶³ and elements (hot, cold, wet, and dry).⁶⁴ Poor interworking of the elements or disruption in the balance of humors causes illness⁶⁵ and calls for intervention to restore balance.⁶⁶

When it comes to humors, excess was considered as dangerous as deficiency,⁶⁷ and many treatments were meant to absorb or rid the body of excess.⁶⁸ One famous method of restoring humoral balance, if an excess build-up of the sanguine humor was diagnosed, was blood-letting.⁶⁹ “Venesection,” an incision into a vein to release blood, became a practiced art.⁷⁰ One famous example shows the persistence of a view of health as “balance,” with Galenic treatments for re-balancing, in the United States: the blood-letting treatment demanded by George Washington, subsequently re-prescribed by his doctors, resulting in his being bled four times in the last forty-eight hours of life of roughly eighty ounces of blood.⁷¹ A century later, an eminent Boston physician confirmed that the bleeding given Washington would have been acceptable treatment for the same condition in 1860.⁷²

63. Manfred Pawlik, *Foreword* to HILDEGARD OF BINGEN, *HOLISTIC HEALING*, xvi (Manfred Pawlik trans. Latin-German; John Kulas, O.S.B. trans. German-English; Mary Palmquist & John Kulas, O.S.B. eds. of English text, 1994 (1989)) [hereinafter Pawlik, *Foreword* to HILDEGARD].

64. See, e.g., HILDEGARD OF BINGEN, *HEALING*, *supra* note 62, at 45 (“Fire, air, water, and earth are in every human being . . . If the elements work properly in a human being, they sustain him and keep him healthy. However, if they do not live harmoniously in him they disturb him and make him sick.”); see also “PHYSIOLOGIA” OF JEAN FERNEL, *supra* note 62, ch. 5, at 198–200 (“The body of man, like everything else, is united and held together by the coalescence of the four elements.”).

65. See, e.g., HILDEGARD OF BINGEN, *HEALING*, *supra* note 62, at 51 (“a condition of peace and health” depends on maintaining the humors in “correct balance and proper proportion” but “when they conflict with each other, the humors make him weak and sick . . .”).

66. Pawlik, *Foreword* to HILDEGARD, *supra* note 63, at xvi–xvii (Galen’s theory of humors explains physical health and temperament); Henry & Forrester, *Introduction* to FERNEL, *supra* note 62, at 10.

67. HILDEGARD OF BINGEN, *HEALING*, *supra* note 62, at 46 (“[W]henver any humor increases beyond its proper amount, the person is in danger.”).

68. See, e.g., JAMES HAMILTON, *OBSERVATIONS ON UTILITY AND ADMINISTRATION OF PURGATIVE MEDICINE IN SEVERAL DISEASES* (1805). The work of Hamilton (1749–1835), one of the physicians to the Royal Infirmary, enjoyed such popularity that it is reprinted through seven editions. 2 JOHN COMRIE, *HISTORY OF SCOTTISH MEDICINE* 489 (1932), https://archive.org/stream/b20457273M002/b20457273M002_djvu.txt [hereinafter COMRIE, *HISTORY OF SCOTTISH MEDICINE*].

69. See, e.g., Galen, *On Venesection* [surgery to cut a vein] *against Erasistratus*, in GALEN, *ON BLOODLETTING* *supra* note 57, at 15, 21, 25; Galen, *On Venesection against the Erasistrateans in Rome*, in GALEN, *supra* at 38, 38–41, 53; Galen, *On Treatment by Venesection*, in GALEN, *supra* at 67, 67–99.

70. See, e.g., *On Treatment by Venesection*, *supra* note 69. For an example of the accepted use of bloodletting to treat a variety of diagnoses interpreted as an excess of sanguine humor, see ARCHBALD PITCAIRNE, *THE METHOD OF CURING THE SMALL-POX; WRITTEN IN THE YEAR 1704 OF THE USE OF THE NOBLE AND HONOURABLE FAMILY MARCH* (printed ed. 1715) (advising, before the introduction of inoculation knowledge from Turkey to England, bloodletting from the arm and then a purgative to treat smallpox), *cited in* COMRIE, *HISTORY OF SCOTTISH MEDICINE*, *supra* note 68, at 428–29.

71. See, e.g., *The Death of George Washington*, Digital Encyclopedia of George Washington, <http://www.mountvernon.org/research-collections/digital-encyclopedia/article/the-death-of-george-washington/>.

72. See J.H. Mason Knox, Jr., *The Medical History of George Washington, His Physicians, Friends, and Advisers*, 1 BULL. INST. HIST. MED. 174, at 180 (1933) (reporting Washington’s treatment and the opinion, a century later, of Boston physician Dr. James Jackson). Despite skepticism, “heroic treatment”

2. Warmth, Retained Matter, and Natural Purgation

The idea of humoral balance provided an overarching heuristic within which other details of Galen's theories of health fit. Men, in Galen's schema, are constitutionally "warmer"⁷³ than women,⁷⁴ a fact of physiology with basic effects on digestion and consequences for women's humoral balance. The deficit of "heat" in women,⁷⁵ Galen thought, leaves women unable to concoct ("literally, 'cook'")⁷⁶ their nutrients during digestion as thoroughly as men.⁷⁷ Retained matter, like the residue from digestion, leads to humoral imbalance and illness.⁷⁸ Women, because of their insufficient heat, produce a greater proportion of leftover or waste matter during digestion, but they cannot get rid of it through other processes like sweating or hair growth that occur naturally in men.⁷⁹ Due to their innate coldness and its consequences, women need an additional method of purging themselves of waste matter. Menstruation, in Galenic theories of health, serves that indispensable function.⁸⁰

3. Menstruation: First, a Means of Purgation

Menstruation, a regular process of emission directly involving one of the humors (blood), thus bore particular significance in Galenic theories of health. Whereas in modern Western thought, menstruation is considered "a mere by-product of the female reproductive cycle," a monthly shedding of uterine lining when no fertilized ovum is implanted, "in Hippocratic and Galenic

as a response to the inflammation in Washington's throat is still legible to medical commentators as late as the 1930s. *Id.* at 182.

73. In "hot" and "cold," Galen and Galenic physicians are not referring to measurable differences in thermal heat (and, moreover, no instruments then existed to measure thermal heat) but rather are referring to general principles of warmth or its absence. Green, *Introduction* to THE TROTULA, *supra* note 34, at 174 n.81.

74. GALEN, *De usu partium*, bk. 14, ch. 7, at 630 (Margaret Tallmadge May trans., 1968), *cited in* "PHYSIOLOGIA" OF JEAN FERNEL, *supra* note 62, at 625 n.8.

75. GREEN, *Introduction* to THE TROTULA, *supra* note 34, at 19–20 ("[D]efect it was, for heat was the very principle of life, its absence or deficiency a sign of a less than perfect life form.").

76. *Id.* at 20.

77. *Id.* at 19–20.

78. *Id.*

79. *Id.* at 20; *see also, e.g.*, HILDEGARD OF BINGEN, *HEALING*, *supra* note 62, at 108 ("A woman has a greater number of damaging fluids and a more damaging corruption in her body than a man." Menstruation rids women of excess, "their noxious fluids and poisonous corruptions," and if not for its cleansing, "their whole body would . . . become bloated and not be able to remain alive."); "PHYSIOLOGIA" OF JEAN FERNEL, *supra* note 62, at ch. 7, bk. 7, 561, 563 (Since the male "overflows with a great deal of heat, he completely modifies and digests all the food he has taken in" and "powerfully dispels anything further overflowing," but the female "secured a heat too weak to be capable of dispelling an excess. She has accordingly been granted the benefit of menstrual blood, out of . . . an imperfect nature." What flows out at the appointed cycles is a "sick kind of blood.").

80. THE TROTULA, *supra* note 62, at sect. 3, 66 ("Because there is not enough heat in women to dry up the bad and superfluous humors which are in them, nor is their weakness able to tolerate sufficient labor so that Nature might expel [the excess] to the outside through sweat as [it does] in men, Nature established a certain purgation especially for women, that is, the menses, to temper their poverty of heat.").

gynecology menstruation was a necessary purgation, needed to keep the whole female organism healthy.”⁸¹ If not expelled through menstruation, excess materials would “accumulate and sooner or later lead to a humoral imbalance—in other words, to disease.”⁸² Through menstruation, a woman’s body achieved its necessary purging.

In early modern thought, therefore, menstruation was a significant way for a woman’s body to maintain humoral balance and health. Amenorrhea, i.e., the absence of menstruation in a woman of menstruating age, posed danger. This is not to say that early moderns did not understand a connection between pregnancy and cessation of menstruation. It is more complicated than that. The first function of menstruation, they thought, was to preserve health: when menstruation happened “in normal amounts, at the normal times,” a woman was likely to be healthy.⁸³ If menstruation failed to occur, pregnancy itself might absorb potential accumulations of excess materials and humoral imbalance.⁸⁴ “Retained menses” and “pregnancy” were not synonyms; these two conditions might exist in parallel. In fact, for some medical thinkers, retaining menstruation was one more condition of heightened danger attendant upon being pregnant, and the effect of retained menses during pregnancy was the subject of much concern.⁸⁵

Within the core schema of humors, balance, excess, and health, the absence of menstruation was taken *not merely as a symptom* of some underlying cause. *It was seen as a cause*, in itself, of disease. Any irregularity of menstruation was “a serious threat to overall health.”⁸⁶ From menarche to menopause, “a woman should be menstruating regularly if she is to remain healthy.”⁸⁷ The horrors wrought by “suppressed menstruation” included “blockages of viscera, wasting, cancer, epilepsy, and very many [sorts] of this destruction.”⁸⁸ The upshot is that cessation of menstruation could be associated with the humoral-balancing condition of pregnancy, or cessation of menstruation might, itself, be a cause of humoral imbalance and disease. In Hippocratic and Galenic thought, “absence of menstruation—or rather, *retention* of the menses, for the waste material was almost always thought to be collecting whether it issued from the body or

81. GREEN, *Introduction* to THE TROTULA, *supra* note 34, at 19.

82. *Id.* at 20; *see also, e.g.*, HILDEGARD OF BINGEN, *HEALING*, *supra* note 62, at 91 (“[T]he woman is weak and cold, and the humors in her are weak. As a consequence, she would be continually sick if her blood were not periodically cleansed through menstruation. In the same way, food cooking in the pot is cleansed when it throws off its foam from itself.”).

83. GREEN, *Introduction* to THE TROTULA, *supra* note 34, at 20.

84. *Id.* (explaining that when a woman did not menstruate because of pregnancy or lactation, “the excess matter—now no longer deemed ‘waste’—either went to nourish the child in utero or was converted into milk”).

85. *See, e.g.*, “PHYSIOLOGIA” OF JEAN FERNEL, *supra* note 62, at ch. 7, bk. 7, 563, 565 (arguing that, since menstrual blood, unlike “more useful blood” is inherently “noxious,” it is implausible that “a fetus carried in the womb possibly snatches nutriment from it.”).

86. GREEN, *Introduction* to THE TROTULA, *supra* note 34, at 20.

87. *Id.* at 19–20.

88. “PHYSIOLOGIA” OF JEAN FERNEL, *supra* note 62, at ch. 7, bk. 7, 563.

not—was cause for grave concern, for it meant that one of the major purgative systems of the female body was inoperative.”⁸⁹

Amenorrhea thus demanded a therapeutic response from any responsible medical practitioner and “the necessary therapeutic response was simple: induce menstruation.”⁹⁰ Knowing this, it should come as no surprise that “the largest percentage of prescriptions for women’s diseases in most early medieval medical texts . . . were aids for provoking the menses.”⁹¹ They worked. These medieval prescriptions, twentieth-century medical research reveals, commonly contain ingredients we now know to be emmenagogues (i.e., agents that induce menstruation) or abortifacients (i.e., agents that effectuate abortion).⁹²

B. DIAGNOSING PREGNANCY, DETECTING LIFE

Three factors made detecting fetal life an important diagnostic step in preserving women’s health for early moderns: (1) the importance of menstruation in humoral health and the alarm that amenorrhea thus raised;⁹³ (2) understanding pregnancy as a condition that could absorb excess materials and stave off humoral imbalance;⁹⁴ and (3) the absence of pregnancy tests, imaging, or alternative means of ascertaining pregnancy.⁹⁵ Conception and what happens afterwards thus became a matter of importance in the domain of women’s health beyond concerns about reproduction, and the subject of much speculation.

The Latin in which most medieval and early modern medical texts were written makes a distinction between the *conceptus*, the product of human conception, and its later developed state, the *fetus*.⁹⁶ This distinction supports the Aristotelian idea, widely accepted in medieval and early modern Europe, of *in utero* development⁹⁷: a *conceptus* takes on human form and is instilled with its own vital heat, or “animated,” over time.⁹⁸ For early moderns concerned with

89. GREEN, *Introduction* to THE TROTULA, *supra* note 34, at 20.

90. *Id.*

91. *Id.*

92. See generally RIDDLE, ANCIENT ABORTION, *supra* note 33 (reviewing modern scientific findings of a predominance of abortifacient ingredients in medieval prescriptions for gynecological purgatives).

93. See *supra* Part I.A.1. and Part I.A.3.

94. See *supra* Part I.A.3.

95. See *supra* Introduction, text accompanying notes 28–29.

96. Henry and Forrester, *Introduction* to FERNEL, *supra* note 62, at 10. This distinction is hard to render into English, which lacks an equivalent for *conceptus*. *Id.*

97. See, e.g., ARISTOTLE, POLITICS, 7.16.15.1335b19–26 (H. Rackham trans., G.P. Putnam’s Sons ed. 1932) (distinguishing the “unformed,” a state “before sense and life have begun in the embryo,” and “the formed” *in utero*). For later adherents to an Aristotelian conception of *in utero* development, see for example HILDEGARD OF BINGEN, HEALING, *supra* note 62, at 54–55 (describing how during the first month a seed *in utero*, although already with the four humors and four elements, becomes a still unformed “thick mass that is not yet alive” and develops from there).

98. Aristotle’s conceptualization of formation and animation *discussed* in MARIE-THÉRÈSE FONTANILLE, ABORTION ET CONTRACEPTION DANS LA MÉDECINE GRÈCO-ROMAÏNE 194 (1977) [hereinafter FONTANILLE, ABORTION DANS LA MÉDECINE GRÈCO-ROMAÏNE], *cited in* RIDDLE, ANCIENT ABORTION, *supra* note 33, at 22–23; see also, e.g., HILDEGARD OF BINGEN, HEALING, *supra* note 62, at 55–56 (correlating an

detecting pregnancy in order to diagnose pathological amenorrhea, animation became a key diagnostic.

As a corollary, in medieval and early modern thought the soul is not necessarily a feature of the *conceptus*⁹⁹ but rather enters the body later, a development referred to as “ensoulment.”¹⁰⁰ Even when a woman had reason to suspect conception, the soul was not always considered present in a *conceptus*.¹⁰¹ Some procedures meant to provoke menstruation, undertaken to restore humoral balance for a woman, might never have been thought to implicate an ensouled creature, even after conception. However, other times treatment might have been understood as interrupting the continuing development of an ensouled, and thus animated or enlivened, being.¹⁰² Deciphering what was going on came to rely on “quickening,” an English idea about *in utero* development cued by the perception of fetal movement by the pregnant woman, into which Hellenic concepts of animation and ensoulment were assimilated.¹⁰³ “Quickening” became a pivotal concept and element of proof in common-law legal doctrine on abortion. It stood as a proxy for ascertaining pregnancy, only after which something called

immature stage of *in utero* development, at the second month, with the inability of “the form” to “move itself”).

99. For Augustine, *e.g.*, the body of one “not yet formed,” though “some sort of living, shapeless thing [*informiter*]” is “not yet endowed with its senses” and does yet not contain a “living soul.” 33 AUGUSTINE, *Quaestiones Exodi*, 80.1439-45 in SANCTI AURELII AUGUSTINI QUAESTIONUM IN HEPTATEUCHUM, LIBRI 7, pt. 5 (J. Fraipont & Donatien de Bruyne eds., Corpus Christianorum: Series Latina Brepols 1958), translated and discussed in G.R. Dunstan, *The Human Embryo in the Western Moral Tradition*, in THE STATUS OF THE HUMAN EMBRYO: PERSPECTIVES FROM MORAL TRADITION 39, 44 (G.R. Dunstan & Mary J. Seller eds., 1988); see also RIDDLE, ANCIENT ABORTION, *supra* note 33, at 20 (discussing Aristotle’s ideas of *in utero* formation and the soul).

100. See Augustine, *Quaestiones in Heptateuchem* 2.80 [on Exodus 21:22], in 28 CORPUS SCRIPTORUM ECCLESIASTICORUM LATINORUM pt. 2, at 146–147 (Joseph Zyche ed., Tempusky 1887), cited in RIDDLE, ANCIENT ABORTION, *supra* note 33, at 21 (discussing various possible combinations, according to the works of Augustine and other church fathers, of stages of formation and ensoulment in an embryo); see also, *e.g.*, HILDEGARD OF BINGEN, HEALING, *supra* note 62, at 55–56 (describing ensoulment as the entering of the “breath of life” and the “inflowing of the soul”). For treatment of ensoulment in Renaissance science, see, *e.g.*, “PHYSIOLOGIA” OF JEAN FERNEL, *supra* note 62, at 576 (explaining that the physical form and the soul develop *in utero* until the being can be considered “vital,” alive as a human in both body and soul); see also *id.* at 626 n.23 (discussing Fernel’s idea of the parallel development of biological growth and ensoulment as part of his Aristotelian convictions).

101. The timing of “ensoulment” was never settled in Greco-Roman thought, Judaism, or Christianity. See generally RIDDLE, ANCIENT ABORTION, *supra* note 33, at 20–21; see also, *e.g.*, 1 ARISTOTLE, *Generation of Animals* 736a-b in THE COMPLETE WORKS OF ARISTOTLE at 1111, 1142–43 (Jonathan Barnes ed. & A. Platt trans., Bollingen Series, Princeton Univ. Press, 1995 (1984)) (avoiding stating a definite point at which a being *in utero* is endowed with a rational soul).

102. The prevailing thought at this time was that the interval between “conception” and “animation” is perceived as a zone in which action can be taken without raising questions of moral or legal wrongdoing by patient or health practitioner in regard to the fetus. FONTANILLE, ABORTION DANS LA MÉDECINE GRÉCO-ROMAÎNE, *supra* note 98, at 194; also discussed in RIDDLE, ANCIENT ABORTION, *supra* note 33, at 22–23.

103. See *infra* Part I.D.4 (for further discussion of common law doctrine, including that implicating ideas about quickening).

“abortion” would even have been at issue.¹⁰⁴

C. ABORTION: THEORY AND PRACTICE

The distinctions laid out above give us tools to re-examine our thinking about practices we would now think of as abortion. First, the contemporary reader must continually bear in mind that in the early modern period, cessation of menstruation in a woman of childbearing years was not exclusively associated with pregnancy. Under humoral conceptions of health, cessation of menstruation could also have been considered a serious cause, not symptom, of ill-health.¹⁰⁵ If it accompanied pregnancy, the problem was less acute: excess matter could be absorbed in the processes of developing a *conceptus* into a *fetus*.¹⁰⁶ However, absent pregnancy, amenorrhea caused a dangerous build-up of waste materials in a woman that any responsible medical practitioner would find it incumbent to address.¹⁰⁷ “Abortion” typically meant intervention after quickening and risked side effects (like uncontrolled hemorrhaging) that become increasingly dangerous to the patient over the duration of pregnancy. Pre-quickening intervention and its risks were understood in a completely different light.

Thus diagnosis. What about treatment? Practitioners in early-modern England, benefitting from centuries of accumulated experimentation,¹⁰⁸ deployed a remarkable range of uterine-purging measures when faced with amenorrhea in a woman of menstruating age.¹⁰⁹ Some were classed as “emmenagogue,” a treatment intended to induce menstruation¹¹⁰ without any necessary reference to terminating pregnancy.¹¹¹ Others were classed as “abortifacient,” intended to expel a *conceptus* or *fetus*.¹¹² Medical texts admitted the potential for ambiguity,

104. “Quickening” is understood as a proxy heuristic, not to be confused with an equivalent of certainty regarding pregnancy. Practitioners as late as the early twentieth century guarded against over-relying on “quickening” to diagnose pregnancy, alert, *inter alia*, to so-called “false quickening.” See, e.g., ALEXANDER MILNE, *THE PRINCIPLES AND PRACTICE OF MIDWIFERY WITH SOME OF THE DISEASES OF WOMEN* 67–79 (1884) (describing, in physician-authored medical textbook, “false quickening” and other problems with diagnosing pregnancy).

105. See, e.g., “PHYSIOLOGIA” OF JEAN FERNEL, *supra* note 62, at 563.

106. See *supra* Part I.A.3.

107. See *supra* Part I.A.3.

108. See generally RIDDLE, *ANCIENT ABORTION*, *supra* note 33 (cataloguing thousands of emmenagogic and abortifacient prescriptions from antiquity through early modern times, with modern laboratory verifications of their abortifacient properties, to argue that since antiquity, abortions were always available in the West); see also *id.* at 7 (summarizing his conclusion that a widespread culture of abortion obtained during the periods under study).

109. For example, in the medieval health manual *Conditions of Women*, a portion of *The Trotula* meant to cover all aspects of women’s health, more than one-third of the entire catalogue is devoted to treating conditions related to menstruation. Green, *Introduction to THE TROTULA*, *supra* note 34, at 21.

110. See *supra* Parts I.A.2 and I.A.3.

111. See GREEN, *Introduction to THE TROTULA*, *supra* note 34, at 20 (pointing out the difficulty that the *Trotula* manuscripts’ distinction between pregnant and pathological amenorrhea posed to some later manuscript copyists).

112. Some are also understood as, and administered as, contraceptives, but that usage is beyond the scope of the present inquiry and will not be discussed here.

noting some measures both provoke menstruation and cease generation,¹¹³ making it impossible to assume intent *ex poste*.¹¹⁴ Surveying contemporaneous gynecology, I identify three kinds of treatments: (1) *potion*, meaning intentional administration of a chemical or biochemical substance, usually a plant preparation; (2) *external manipulation*, which can range from poultice to massage to abdominal blows; and (3) *internal intrusion*, mechanical rather than biochemical intervention, by vaginal insertion (or, more rarely, incision through the abdominal wall) to interrupt uterine function. To give an idea of the range of treatment options available to early modern gynecology, the two therapeutic classifications (emmenagogue and abortifacient) with the three kinds of treatments (potional, external, and intrusive) are outlined briefly below.

1. Emmenagogues

Potional emmenagogue was the most common response to amenorrhea either before or after quickening.¹¹⁵ Early modern gynecology gives scores of recipes to be administered orally to “extract the menses,”¹¹⁶ “move the menstrea,”¹¹⁷ or “put in motion the menstrea.”¹¹⁸ The most common alternative to orally administering an emmenagogic potion was to soak a ball of cotton or other

113. A preparation made from the Chaste Tree is an example of one such dual-use treatment. *See, e.g.*, DIOSCORIDES, *DE MATERIA MEDICA* [MATERIALS OF MEDICINE] 1.103 (Max Wellman ed., Weidmann 1958) [hereinafter DIOSCORIDES, *DE MATERIA MEDICA*] (“The Chaste Tree destroys generation as well as provokes menstruation.”), *cited in* RIDDLE *supra* at 31; *id.* at 3.7 (prescribing birthwort, drunk with pepper and myrrh, to expel menstrea and to expel a *conceptus* or *fetus*), *cited in* RIDDLE *supra* at 32.

114. John Riddle proposes that “provoking menses” is merely a coded way of talking about widespread practices of contraception and abortion. *See generally* RIDDLE, *ANCIENT ABORTION*, *supra* note 33 (arguing that “provoking menstruation” was, in medieval health texts, code for procuring abortion). However, historian Monica H. Green, disagrees and argues for taking earlier medical texts at their word: they really do consider some substances uterine purgatives to induce menstruation, a legitimately separate domain of Hippocratic-Galenic medical practice from purposefully inducing miscarriage. Green, *Introduction to THE TROTULA*, *supra* note 34, at 21, 215 n.83.

115. *See supra* Part I.A.3. (explaining how “retained menses,” as a medical condition, could exist separately though simultaneously with pregnancy).

116. *See* DIOSCORIDES, *DE MATERIA MEDICA*, *supra* note 113, at 2.109 (cultivated lupine to extract the menses or expel a fetus), *cited in* RIDDLE, *ANCIENT ABORTION*, *supra* note 33, at 32) (listing cultivated lupine as a remedy to extract the menses or expel a fetus).

117. *Id.* at 3.80 (listing *silphium* drunk with pepper and myrrh to move the menstrea).

118. *Id.* at 4.146 (listing a treatment of Mediterranean mezereon); *see also, e.g.*, GALEN, *De compositione medicamentorum secundum locum* [“On Compound Medicines according to Site”], 9.4, 13:283-284 in CLAUDII GALENI OPERA OMNIA (Karl Gottlieb Kühn ed., Olms 1964-65 (1821-33)) (prescribing willow and rue; and willow, rue, ginger, and date palm), *cited in* RIDDLE, *ANCIENT ABORTION*, *supra* note 33, at 85; THE TROTULA, *supra* note 62, at 89-90 (prescribing red willow cleaned, pulverized, and stewed with wine or water; or wafers of ground madder and marsh mallow, mixed with barley flour and eggwhites; or a fumigant made from these herbs); *id.* at 67 (prescribing *diathessaron*: mint or myrtleberry, felwort, birthwort, and laurel berry, cooked with honey); *id.* at 68 (describing a powder of yellow flag, hemlock, castoreum, mugwort, sea wormwood, myrrh, common centaury, and sage mixed with a stew of myrrh and savin and drunk); *id.* at 106 (prescribing vervain and rue, pounded and cooked with bacon, followed by a beverage of ground delicate willow root juice and madder mixed with wine); HILDEGARD OF BINGEN, *HEALING*, *supra* note 62, at 165-66 (prescribing *inter alia* a beverage made from stewed and ground heidelberg, yarrow, rue, Easter lilies, cloves, and white pepper with wine).

tampon-like object in the substance and insert it vaginally.¹¹⁹ These vaginal suppositories, known as *pessaries*,¹²⁰ are also widely attested in practice manuals.¹²¹

Aside from potional means, practice manuals prescribe emmenagogic treatment by *external manipulations* ranging from poultice¹²² and massage¹²³ to bleeding by venesection under the arch of the foot.¹²⁴ The most invasive delivery method for an emmenagogic agent I found, given in the influential medical handbook *The Trotula*, is a fumigant piped through a reed to a sitting woman's womb.¹²⁵ Even this treatment, although using a more intimately positioned delivery mechanism, works through chemical or biochemical agent rather than physical interference. One category is missing: None of the materials I surveyed provided evidence of emmenagogic treatment by internal intrusion.

2. Abortifacients

As with emmenagogues, ingested *potion* was the most common abortifacient intervention. Hippocratic texts prescribe them,¹²⁶ other widely consulted medical authorities advise them,¹²⁷ and private sources attest to widespread practical

119. See, e.g., THE TROTULA, *supra* note 62, at 68 (calling for carded wool to be soaked in a mixture including gall from a bull and then “pressed so it is hard and rigid and long so that it can be put into the vagina”). Another recipe directs, “let there be made another pessary in the shape of the male member, and let it be hollow, and inside there let the medicine be placed and let it be inserted.” *Id.*

120. *Pessaries* mentioned in *Roe v. Wade*, 410 U.S. 113, 131 n.14 (1973).

121. See, e.g., 8 HIPPOCRATES, *De mulierum affectibus*, in OEUVRES COMPLÈTES D'HIPPOCRATE: TRADUCTION NOUVELLE AVEC LE TEXTE GREC EN REGARD bk. 1, § 78, 1–12, at 173 (Emile Littré ed., chez J.B. Baillière 1839–1861), (*reproduced in* Hakkert, 1973) [hereinafter HIPPOCRATES, *De mulierum affectibus*] (“an efficacious pessary” consists of inserting into the vagina a mixture of cantharine beetle parts, leaves and roots of small caltrop, a small amount of crushed plant of the chrysanthemum family, celery seed, and fifteen cuttlefish eggs); DIOSCORIDES, *DE MATERIA MEDICA*, *supra* note 113, at 2.152 (advising a garlic pessary to “bring down the menses”), *cited in* RIDDLE, *ANCIENT ABORTION*, *supra* note 33, at 37. See generally RIDDLE, *ANCIENT ABORTION*, *supra* note 33, at 36–38 (reviewing twentieth-century biomedical research verifying the efficacy of various vaginal suppositories prescribed in antique, medieval, and early modern texts).

122. See, e.g., HILDEGARD OF BINGEN, *HEALING*, *supra* note 62, at 165 (prescribing a poultice of aniseed and feverfew poultice applied externally to the genitalia to “relax the monthly flow”).

123. See, e.g., THE TROTULA, *supra* note 62, at 106 (advising a cushion of carded wool, soaked in mugwort stewed with savin, pennyroyal, or other herbs, laid as a poultice on the belly); see also *id.* at 68 (calling for laying cooked chickweed on the belly).

124. For retention of the menses, the *Trotula* advises the practitioner bleed the woman from the vein under the arch of the inside of the foot, alternating feet day by day. *Id.* at 67; see also *id.* at 106.

125. *Id.* at 68 (prescribing “fomentation” by catmint smoke, i.e. advising that a care-giver cook catmint in a pot and “let the woman set a perforated chair over it and let her sit there covered all over and let the smoke come out through a reed, so that the smoke is received inside penetrating through the reed up to the womb”).

126. HIPPOCRATES, *De mulierum affectibus*, *supra* note 121, bk. 1, §§ 80–82 (listing six early-stage abortifacients to be taken with wine or water), bk. 1, §§ 82–84 (giving eight ingestibles to induce miscarriage), *discussed in* RIDDLE, *ANCIENT ABORTION*, *supra* note 33, at 78–80.

127. See, e.g., DIOSCORIDES, *DE MATERIA MEDICA* *supra* note 113, at bk. 2, ch. 159–166, *cited in* RIDDLE, *ANCIENT ABORTION*, *supra* note 33, at 44–45 (discussing “sharp herbs” among which abortifacients figure prominently, including soapwort to dry out menses and kill embryo; edderwort to

knowledge of potions that can, as one says, “cause miscarriage” and “force away the birth dead or alive as allso [*sic*] the afterbirth.”¹²⁸

Potential abortion by pessary was also widely known.¹²⁹ Hippocrates labeled some *pessaries* as “ecbolic suppository” (an ecbolic being a substance that causes contraction of the uterus),¹³⁰ but he labeled others, straightforwardly, as abortifacient,¹³¹ meant to “draw down the crippled embryo/fetus” or to “release a half-completed embryo/fetus.”¹³² (The Hippocratic abortifacients¹³³ are particularly notable given the symbolic weight that the Hippocratic oath came to hold in the nineteenth-century United States physicians’ movement to prohibit abortion by law.¹³⁴) Such prescriptions for potential abortion—ingested or pessary—were common knowledge among early-modern health practitioners.

Among *external manipulations* meant to induce abortion, early modern texts give evidence of poultice¹³⁵ and bloodletting.¹³⁶ However, simple activity appears to be the external manipulation most commonly advised (or undertaken

abort a developing, or perhaps early stage, *fetus*; and lords and ladies to expel a *conceptus*); see also DIOSCORIDES, *THE GREEK HERBAL OF DIOSCORIDES: ILLUSTRATED BY A BYZANTINE A.D. 512. ENGLISHED BY JOHN GOODYER A.D. 1655* (Robert T. Gunther ed., Hafner 1959 (1933)) at ch. 48 (no pagination) (“Dioscorides sayth that Peper, Rue, Tuttsayne, Calamint, Castoreum, wast the sede of generacyon (by dryuyng it up) of their propertie and strong heate . . .”), cited in RIDDLE, *ANCIENT ABORTION*, *supra* note 33, at 149.

128. Jerningham family medicinal receipt book, Jerningham MS 3/H/1, fol. 65 (late seventeenth century) (Stafford, Eng. Record Office), cited in Linda A. Pollock, *Embarking on a Rough Passage: The Experience of Pregnancy in Early-Modern Society*, in *WOMEN AS MOTHERS IN PRE-INDUSTRIAL ENGLAND: ESSAYS IN MEMORY OF DOROTHY McLAREN* 39, 56 (Valerie Fildes ed., 2013 (1990)); see generally *id.* at 53–58 (discussing miscarriage in early modern England); see also ANGUS McLAREN, *REPRODUCTIVE RITUALS: PERCEPTIONS OF FERTILITY IN ENGLAND FROM THE SIXTEENTH CENTURY TO THE NINETEENTH CENTURY* 73–75 (1984) (finding in a survey of early modern England women using many of the same abortifacient plant preparations as their medieval predecessors).

129. See, e.g., DIOSCORIDES, *DE MATERIA MEDICA*, *supra* note 113, at 4.172 (giving Mediterranean mezereon “on a pad” to expel a fetus), cited in RIDDLE, *ANCIENT ABORTION*, *supra* note 33, at 36; see also DIOSCORIDES, *supra* at 1.1 (describing lily root, applied as a pessary with honey, to “draw down the embryo”); RIDDLE, *ANCIENT ABORTION*, *supra* at 35 (citing a pepper pessary to “dry out” a fetus/embryo).

130. HIPPOCRATES, *De mulierum affectibus*, *supra* note 121, bk. 1, § 78, 1–12, at 173; *id.* at 12–14 (suggesting the squirting cucumber plant).

131. *Id.* at bk. 1, § 78–80, at 173–200 (grouping respectively ecbolic suppositories and nine abortifacient vaginal suppositories), summarized in RIDDLE, *ANCIENT ABORTION*, *supra* note 33, at 77.

132. *Id.* at bk. 1, § 78, at 177; see also, e.g., DIOSCORIDES, *DE MATERIA MEDICA*, *supra* note 113, at 2.152 (advising a garlic pessary to “bring down the menses”), cited in RIDDLE, *ANCIENT ABORTION*, *supra* note 33, at 37.

133. See, e.g., HIPPOCRATES, *De mulierum affectibus*, at bk. 1, § 78–80, at 173–200; see also, e.g., *supra* notes 126, 131 (Hippocratic texts openly describing substances as abortifacient, explaining them, and prescribing them).

134. See *infra* Part III.A.2. (discussing the nineteenth-century anti-abortion movement led by U.S. physicians and the role of the Hippocratic oath therein).

135. See, e.g., DIOSCORIDES, *DE MATERIA MEDICA*, *supra* note 113, at 3.3 (describing a poultice of gentian among treatments explicitly labelled “abortifacient”), cited in RIDDLE, *ANCIENT ABORTION*, *supra* note 33, at 39; see also DIOSCORIDES *id.* at 1.1.

136. See, e.g., John Christopoulos, *Abortion and the Confessional in Counter-Reformation Italy*, 65 *RENAISSANCE Q.* 443, 463 (2012) [hereinafter Christopoulos, *Abortion and the Confessional*] (citing MARTIN AZPILCUETA, *CONSILIORUM SIVE RESPONSORUM* cons. 47, 455 (1595) (priest admitting to the

by) a woman wishing to induce miscarriage. One treatise advocated jumping¹³⁷ and another prescribed walking energetically¹³⁸ or, if pregnancy persisted, pairing treatments like softening vaginal suppositories, bleeding, or fasting with getting “shaken” by riding draft animals.¹³⁹ Beating the stomach of a pregnant woman with a hawthorn root could cause abortion, in Dioscorides’ rather genteel version¹⁴⁰ of “abortion by blows,” a practice evidenced more roughly in a variety of historical and legal texts.¹⁴¹

Widely consulted medical texts commonly prescribed abortifacient treatments by potion and external manipulation. By contrast, causing abortion by *internal intrusion* via the vagina to pierce a placenta, cause expulsion, or extract a *fetus* or by incision through the abdominal wall—though an option also well-known to caregivers—was generally disfavored. Medical texts typically warn against “separating the embryo by means of something sharp-edged” because adjacent parts can be injured,¹⁴² and, as poets lamented,¹⁴³ the woman doing so risked her own death. Very few accounts of abortion by instrument exist from early modern England,¹⁴⁴ and historian Cornelia Hughes Dayton finds only one description of

Apostolic Penitentiary in the late 1500s that, before taking orders, he had impregnated a woman and after “forty days” (meaning a *conceptus* is presumed) counseled her to abort by letting blood)).

137. 7 HIPPOCRATES, *De natura pueri* [“*On the Nature of the Child*”] bk 4, § 90 (Emile Littré ed., chez J.B. Baillière 1839–1861) (*reproduced* Hakkert, 1973) (advising the so-called “Lacedaemonian leap, that is, ‘leaping with the heels to the buttocks for the sake of expulsion’”), *cited in* RIDDLE, ANCIENT ABORTION, *supra* note 33, at 9. This instruction of Hippocrates for expelling an unwanted *fetus* repeated in SORANUS, GYNAECOLOGY 63 (Oswei Temkin ed. & trans., 1956) [hereinafter SORANUS, GYNAECOLOGY], *cited in* RIDDLE, ANCIENT ABORTION, *supra*, at 9.

138. SORANUS, GYNAECOLOGY *supra* note 137, 1.64 at 66 (prescribing walking energetically, riding horseback, jumping, or carrying heavy loads), *cited in* RIDDLE, ANCIENT ABORTION, *supra* note 33, at 46.

139. *Id.* at 67, *cited in* RIDDLE, ANCIENT ABORTION, *supra* note 33, at 47.

140. DIOSCORIDES, DE MATERIA MEDICA, *supra* note 113, at 1.93, *cited in* RIDDLE, ANCIENT ABORTION, *supra* note 33, at 51.

141. *See, e.g.,* the papal bull of 1588 which includes among measures “to kill . . . immature fetuses in the maternal viscera” external manipulations—violence, burdens, and work—imposed on a pregnant woman. Sixtus V, *Contra Procurantes, consulentes, & consentientes, quocumque modo Abortum*, preface to CONSTITUTIO, n.1, n.5) (1588), *cited in* Christopoulos, *Abortion and the Confessional*, *supra* note 136, at 466–467, 468.

142. SORANUS, GYNAECOLOGY, *supra* note 137, 1.65 at 68, *cited in* RIDDLE, ANCIENT ABORTION, *supra* note 33, at 48.

143. OVID, AMORES, II., xiv 27–28, 35–40 (Grant Showerman trans., Loeb Classical Library, 1921) <https://www.loebclassics.com/view/ovid-amores/1914> (“Ah, women! Why will you thrust and pierce with the instrument [literally: why do you dig with shafts at your vitals from below] . . . oft she who slays her own in her bosom dies herself”).

144. One of the rare accounts from England comes from the trial of Eleanor Beare, accused of abortion by instrument in 1732. Witness Grace Belfort testifies that her employer Beare, having heard that Grace feared herself pregnant, collected 30 shillings for the procedure and then “my Mistress brought a kind of an Instrument, I took it to be like an Iron Skewer, and she put it up into my Body a great Way, and hurt me,” thereby inducing miscarriage. Upon conviction in this and on a poison procurement charge in a separate incident, Beare is sentenced to stand pillory two market days and suffer “close Imprisonment” for three years. Though the press account does not report the legal rule invoked, clues indicate that because the procedure involved a quickened fetus and thus posed exceptional danger to Grace Belfort, it arouses the attention of the law. *See The Tryal of Eleanor Beare of Derby*, 2 GENTLEMAN’S MAGAZINE, Tuesday, August 15, 1732, at 931–32 (1732); *see also* Cornelia Hughes Dayton, *Taking the Trade:*

it in her review of colonial American court records.¹⁴⁵ Though surgical instruments used in intrusive practices date back to antiquity,¹⁴⁶ the overall impression left by early modern medical texts and legal records is that abortion by vaginal intrusion or surgical intervention was seen as dangerous and irresponsible, and thus rare, in sharp contrast with commonplace potional uterine purging.¹⁴⁷

By the end of the seventeenth century, the abortion doctrine accepted as the common-law standard was formulated.¹⁴⁸ By some historians' reckoning, this same period stands as the high-water mark of knowledge of emmenagogic and abortifacient remedies in gynecological practice.¹⁴⁹ Humoral methods were so effective, Riddle argues, that overall, humoral health practice suppressed population growth in Europe measurably below the natural rate of increase.¹⁵⁰ For early moderns, abortion by potion was routine; by intrusion or surgery, dangerous and rare. And the most common procedure terminating pregnancy, emmenagogue, might not have been thought of as "abortion" at all.

D. LAW

1. The Background of Medical Practice

Health, life, abortion: these are the terms we have been investigating in early modern understandings and practice, in order to reconsider common-law doctrine on abortion and the antecedents of the "health exception" in the terms of their time. Under Galenic theory, health requires humoral balance; in women, that depends on regular menstruation;¹⁵¹ its interruption demands purgative treatment. Untreated, retained menses can cause dire effects, from cancer to epilepsy.¹⁵² Early modern medicine developed purgative compounds¹⁵³ (many principal ingredients of which, twentieth-century science finds, are abortifa-

Abortion and Gender Relations in an Eighteenth Century New England Village [hereinafter Dayton, *Taking the Trade*], in *WOMAN AND HEALTH IN AMERICA* 12, 12, 29 n.2 (Judith Walzer Leavitt ed., 2nd ed. 1999) [hereinafter Leavitt, *WOMAN AND HEALTH*].

145. Dayton, *Taking the Trade*, *supra* note 144, at 20.

146. *See, e.g.*, RIDDLE, *ANCIENT ABORTION*, *supra* note 33, at 172 n.27 (citing M. Moïssidès, *Contribution à l'étude de l'avortement dans l'antiquité grecque*, 26 *JANUS* 1, 59–85 (1922); RALPH JACKSON, *DOCTORS AND DISEASES IN THE ROMAN EMPIRE* 105–109 (1988); J.S. MILNE, *SURGICAL INSTRUMENTS IN GREEK AND ROMAN TIMES* 81–82 (1907)).

147. RIDDLE, *ANCIENT ABORTION*, *supra* note 33, at 10, 166. In contrast to potional interventions, "[s]urgical or manipulated abortions were recognized as dangerous" and therefore rarely attempted. *Id.* at 10.

148. *See infra* Part I.D.

149. RIDDLE, *ANCIENT ABORTION*, *supra* note 33, at 135–166.

150. *Id.* at 7.

151. *See supra* Part I.A.2.

152. *See supra* Part I.A.2. and Part I.A.3.

153. *See supra* Part I.C.

cient).¹⁵⁴ A responsible practitioner routinely induced menstruation during what might have turned out to have been the early months of pregnancy for reasons often unrelated to birth control.¹⁵⁵

Despite this rich practical gynecology, through the early modern period, medicine confessed finding the female abdomen and its inner workings inscrutable.¹⁵⁶ This admittedly incomplete understanding in medicine defied precision and abetted flexibility in law. With pregnancy tough to diagnose for crucial months,¹⁵⁷ “quickening,”¹⁵⁸ the subjective experience of fetal movement by the pregnant woman,¹⁵⁹ came to serve as a heuristic for pregnancy and thus, for “abortion.” Before quickening, no “pregnancy”; no pregnancy, no abortion. The difference between provoking menstruation and causing a miscarriage “was seen as so minimal as not to warrant discussion.”¹⁶⁰ After quickening, intervention (particularly by internal intrusion) was considered increasingly dangerous to the woman¹⁶¹ and a responsible, well-versed practitioner or patient would undertake it reluctantly, weighing it against the consequences for the woman of inaction.¹⁶²

Understanding these prevailing conceptions of health and practices for maintaining it allows us to re-read familiar legal sources with new insight. Two sources that bookend the early-modern period, Bracton and Hale,¹⁶³ provide elements that crystalize into antecedents of the “health exception” at common law.¹⁶⁴

154. See generally John M. Riddle, *Oral Contraceptives and Early-Term Abortifacients During Classical Antiquity and the Middle Ages*, 132 PAST & PRESENT 3 (1991) (identifying compounds from antiquity tested as abortifacient and/or contraceptive by modern laboratory science); *contra*, e.g., PHILIPPE ARIÈS, *HISTOIRE DE POPULATIONS FRANÇAISES ET DE LEURS ATTITUDES DEVANT LA VIE DEPUIS LE XVIIIÈME SIÈCLE* 494–521 (1948) (presuming the virtual absence of contraception in Europe before the seventeenth century on the basis of its “unthinkability”); Keith Hopkins, *Contraception in the Roman Empire*, VIII COMP. STUD. SOC’Y & HIST. 124, 131 n. (1965–66) (describing ancient oral contraceptions as “ineffectual potions”); see also generally RIDDLE, ANCIENT ABORTION, *supra* note 33.

155. See *supra* Part I.A.3. and Part I.C.

156. See generally Cathy McClive, *The Hidden Truths of the Belly: The Uncertainties of Pregnancy in Early Modern Europe*, 15 SOC. HIST. OF MED. 209 (2002) [hereinafter McClive, *Uncertainties of Pregnancy*] (concluding that for women and their medical attendants, the experience and understanding of pregnancy was primarily uncertain, including in regard to quickening, false conceptions, and the threat of miscarriage).

157. See *supra* Part I.B.

158. See McClive, *Uncertainties of Pregnancy*, *supra* note 156 (describing history of quickening and other contemporaneous understandings).

159. See *supra* Part I.B.

160. Carla Spivack, *To ‘Bring Down the Flowers’: the Cultural Context of Abortion Law in Early Modern England*, 14 WM. & MARY J. WOMEN & L., 107, 123 (2007) [hereinafter Spivack, *Context of Abortion Law in Early Modern England*].

161. See *supra* Part I.C.

162. See *supra* Part I.C.

163. See *infra* Part I.D.2. and Part I.D.3.

164. See *infra* Part I.D.4.

2. Bracton: The Legality Distinction and the Precautionary Principle

The work of collective authorship that bears Bracton's name, *On the Laws and Customs of England* (1220-1230),¹⁶⁵ is regarded as the standard statement of the common law from the Middle Ages.¹⁶⁶ It mentions abortion twice.

The first abortion passage, in Bracton's section on homicide, comes between recitation of doctrine with direct relevance for women's healthcare providers. Before discussing abortion, Bracton first explains two kinds of homicide. He describes one kind, "homicide by word" (a legal category borrowed from canon law¹⁶⁷), as when "one dissuades another . . . from rescu[ing] someone from death; thus in an indirect way he commits homicide."¹⁶⁸ For therapeutic intent, this is strong stuff, stronger than an affirmative defense, stronger than a category exempted from charge (as afforded by a "life exception"), even stronger than a duty to provide care. It would expose to liability in homicide a bystander who merely dissuaded a rescuer from saving someone in mortal peril—at a time when pregnancy or childbirth regularly imperiled women¹⁶⁹ and in some cases the only possible rescue was induced miscarriage.

165. BRACTON, LAWS AND CUSTOMS OF ENGLAND, *supra* note 58. Its continued influence is felt in ways large and small. An 1843 Iowa criminal statute, for example, uses (without citation) the canon law hypothetical that Bracton's retransmission entrenches of homicide by chance, as when a master flogs a pupil in discipline and the pupil dies as a result. *Id.* at 341; *cf.* IOWA (TERR.) REV. STAT., ch. 49 §19 (1843) (giving an example of "excusable homicide by misadventure").

166. *See, e.g.*, PAUL VINOGRADOFF, LETTER TO THE ATHENAEUM (July 19, 1884) (Bracton's treatise is "a statement so detailed and accurate that that there is nothing to match it in the whole legal literature of the Middle Ages") reprinted in 1 F.W. MAITLAND, BRACTON'S NOTEBOOK: A COLLECTION OF CASES DECIDED IN THE KING'S COURTS DURING THE REIGN OF HENRY III, at xvii (1887), <https://archive.org/stream/bractonsnoteboo00maitgoog#page/n8/mode/2up>. For insight into a powerful influence on Bracton, namely, the systematic restatement of papal authorities published at the time that Bracton was compiling his work (the *Decretals* of Pope Gregory IX (1234)), see generally Edward Peters, *Master Page on Ius Decretalium (1234–1918)*, CANON LAW INFO (last accessed July 11, 2015) <http://www.canonlaw.info/masterpageIusDecret.htm> (giving general background information on the *Decretals* and links to electronic versions). On Bracton's debt to Roman law in general, and the *Decretals* in specific, see CARL GÜTERBOCK, BRACTON AND HIS RELATION TO THE ROMAN LAW: A CONTRIBUTION TO THE HISTORY OF THE ROMAN LAW IN THE MIDDLE AGES 169 (Brinton Cox trans., 1866) [hereinafter GÜTERBOCK, BRACTON AND ROMAN LAW], <http://babel.hathitrust.org/cgi/pt?id=hvd.32044010502342;view=1up;seq=177>.

167. BRACTON, LAWS AND CUSTOMS OF ENGLAND, *supra* note 58, at 340 (naming two types of homicide, corporeal and spiritual, and specifying the former can be accomplished by word or by deed). *Cf.* CORPUS IURIS CANONICI EDITIO LIPSIENTIS SECUNDA POST AEMILII LUDOUICI RICHTERI, PARS SECUNDA, DECRETALIA COLLECTIONES, DECRETALES D. GREGORII P. IX COMPILATIO (A. Friedberg ed., 2000) (1234) [hereinafter DECRETALS OF POPE GREGORY IX] at tit. 14, cap. 2, <http://www.thelatinlibrary.com/gregdecretals5.html> (proposing that homicide might be perpetrated by word or by deed: "Homicidium autem tam facto quam praecepto, sive consilio aut defensione non est dubium perpetrari"); see also GÜTERBOCK, BRACTON AND ROMAN LAW, *supra* note 166, at 169 (identifying a passage in the *Decretals* that specifies homicide by word and by deed that Bracton repeats here).

168. BRACTON, LAWS AND CUSTOMS OF ENGLAND, *supra* note 58, at 341.

169. *See supra* text accompanying notes 29–33 (on technologies for understanding the mechanics of pregnancy and treating common complications unavailable before the nineteenth century); *infra* notes 216–18 (discussing the risks of pregnancy and childbirth for early modern women).

Bracton goes on to explain a second kind, “homicide by deed.” Of the four circumstances that Bracton imagines might result in homicide by deed,¹⁷⁰ only one, “homicide by chance,”¹⁷¹ would apply in a *bona fide* healthcare context. Chance homicide¹⁷² gave rise to liability unless the accused was (1) engaged in a lawful act and (2) “employed all the care he could.”¹⁷³ Applied to health practice, the doctrine would shield from liability the caregiver whose patient died despite best efforts.

Bracton then specifically discusses abortion in an example of homicide by deed. “If one strikes a pregnant woman or gives her poison in order to procure an abortion, if the fetus is already formed or quickened, especially if it is quickened, he commits homicide.”¹⁷⁴ Read within the terms of its day, the specifics of this text leap out. First, before an animated fetus was at issue (*i.e.*, pre-quickening), pregnancy was not assumed and a procedure would often not have been considered “abortion” in the first place.¹⁷⁵ This excludes most emmenagogues and many early-term fetal expulsives. (Bracton’s wording references Aristotelian concepts that do not equate “fetal formation” with “quickening.”)¹⁷⁶ Second, this was not a blanket sanction against abortion. The passage specifically prohibits only two acts: striking a pregnant woman or giving her “poison,”¹⁷⁷ a substance meant to harm or kill and not a normal synonym for a “potion” used for uterine

170. BRACTON, LAWS AND CUSTOMS OF ENGLAND, *supra* note 58, at 340–41 (they are: homicide in the administration of justice; by chance; by necessity; or by intention, “as where one in anger or hatred or for the sake of gain, deliberately and in premeditated assault, has killed another wickedly and feloniously and in breach of the king’s peace”). Necessity doctrine has been invoked to analyze the modern life exception. *See, e.g.*, D. Seaborne Davies, *The Law of Abortion and Necessity*, 2 MOD. L. REV. 126 (1938) [hereinafter Davies, *Necessity*]; B. James George, Jr., *Current Abortion Laws: Proposals and Movements for Reform*, 17 W. RES. L. REV. 371, 377–78 (1965) [hereinafter George, *Current Abortion Law*] (discussing necessity doctrine as reflected in state abortion statutes, circa 1965).

171. BRACTON, LAWS AND CUSTOMS OF ENGLAND, *supra* note 58, at 341.

172. *See id.* (giving as example the result when one fells a tree and another is accidentally crushed beneath it).

173. *Id.* Güterbock points out that the *Decretals* also made the distinction in homicide by chance between licit and illicit activity. GÜTERBOCK, BRACTON AND ROMAN LAW, *supra* note 166, at 169–170. The canon law of the *Decretals* specifies the same elements for excusing homicide by chance, namely engaging in licit activity and employing diligent care. DECRETALS OF POPE GREGORY IX, *supra* note 167, at tit. 12, cap. 7 (“Homicidium casuale imputatur ei, qui dabat operam rei licitae, si non adhibuit diligentiam, quam debuit.”).

174. BRACTON, LAWS AND CUSTOMS OF ENGLAND, *supra* note 58, at 341. What Samuel E. Thorne translates here into English as “quickened” reads in Latin *animatum fuerit*, “has been animated.” A parallel passage in canon law reads, “He that giveth something to cause abortion is a murderer, if the *conceptus* was a rational animal endowed with life” (“Qui dat causam abortioni, homicida est, si conceptum erat vivificatum animal rationale”). DECRETALS OF POPE GREGORY IX, *supra* note 167, at tit. 12, cap. 20.

175. *See supra* Part I.B.

176. *See supra* Part I.B.

177. BRACTON, LAWS AND CUSTOMS OF ENGLAND, *supra* note 58, at 341. Bracton differs in the means of abortion from the parallel canon law passage, which does not specify only “poison” (but does not include blows). *See* DECRETALS OF POPE GREGORY IX, *supra* note 167, at tit. 12, De Homicidio Voluntario et Casuali, cap. 20.

purgation or abortion.¹⁷⁸ It leaves out the most common means of accomplishing abortion known to Bracton's time, purgative potion.¹⁷⁹ Third, the two enumerated acts speak of assault, undermining easy inference of due care or patient consent and implying a post-quickening procedure posing heightened patient risk.¹⁸⁰ For women's healthcare providers or others who might have wished a woman not pregnant, this doctrine stood as a warning against uncertain, particularly patient-risky practices. Taking all of these specifics into consideration, the text supports the inference that it is the woman's death or endangerment—not the fetus—that evokes liability. The bottom line: read with standard healthcare practices in mind, the passage would expose a practitioner to liability in homicide for poisoning and for abortion by blows, but not otherwise for inducing miscarriage in the course of healthcare.

This first abortion passage is followed by reiteration of the duty to rescue. A person “who, though he could rescue a man from death, failed to do so,”¹⁸¹ ought not be free from punishment. Thus, two passages circumscribe the prohibition on using poison or blows to cause post-quickening miscarriage. Both before and after, Bracton repeats a statement of liability for one who could rescue a person from death but does not. Warned against dangerous practices, the text reiterates care providers' duty to save a woman, including from pregnancy, if her life were imperiled.

Bracton treats abortion by intrusion separately (in his second abortion passage) in a section on “wounding.” In general, a charge of “wounding” only arose from injury by blade, not from assault by weapons like clubs or stones.¹⁸² A “wounding” charge required as proof visual evidence of a “fresh and open wound”¹⁸³ and mere “bruises and contusions” were insufficient,¹⁸⁴ with only one exception: “If anyone forcibly interferes with a woman's internal organs in order to produce abortion,” he is liable for wounding in breach of the king's peace.¹⁸⁵ Lawful medical practice excluded it.

In Bracton, we find several elements that will recur in later abortion regulation: a concern with poison; a precautionary principle, evidenced through imposing liability for patient death if a procedure occurred at a time or in a manner that raised risk to the patient, hedged by a duty to save; and pronounced wariness in

178. What Samuel E. Thorne translates here into English as “poison” reads in Bracton's original Latinate text as *venenum*. *Venenum* is not the same as “potion.” Although “potion” is given as a subsidiary translation for *venenum*, Latin offers other words—*potio*, “potion,” or *medicamentum*, *medicina*, *remedium*—more typically used to indicate emmenagogues and substances employed in potional abortions. Bracton could have used those other words here but does not.

179. *See also*, e.g., *infra* text accompanying notes 182–85 (describing Bracton's second abortion passage, on abortion by intrusive measures, which is not treated in homicide).

180. *See supra* Part I.C.

181. BRACTON, LAWS AND CUSTOMS OF ENGLAND, *supra* note 58, at 342.

182. *Id.* at 408.

183. *Id.* at 406.

184. *Id.* at 408.

185. *Id.*

regard to intrusive measures. What we do not find is also significant: prohibition of abortion *per se*. Regarding all pre-quickening emmenagogues and regarding the most common abortion practice of the time, potional abortion, the law is silent.

3. Hale: The Curative Intent Distinction

Hale's formulation of a life or health defense comes in his discussion of homicide in his restatement treatise, *History of Pleas of the Crown*.¹⁸⁶ The set-up in Hale's discussion is familiar. The person whom a defendant would be accused of harming is the *woman* upon whom the procedure is performed, not the fetus.¹⁸⁷ In his discussion, Hale first rephrases a rule to which Coke had drawn attention, wherein curative intent excuses lethal consequences of medical practice.¹⁸⁸ In Hale's restatement, "If a physician gives a person a potion without any intent of doing him any bodily harm, but with an intent to cure or prevent a disease, and contrary to the expectation of the physician it kills him, this is no homicide, and the like of a chiurgeon."¹⁸⁹ Thus far, his treatment reads like a narrow reapplication of Bracton's "homicide by chance" doctrine.¹⁹⁰ For anyone who administered a potion after which a woman died, Hale's holding offered blanket protection. The charge would not lie if the person administered the potion with intent to "cure her of a disease."¹⁹¹

Hale distinguishes this situation from the death of a woman from a procedure intended to "destroy the child within her."¹⁹² Hale's distinction between administering a potion to cure a woman versus to destroy a fetus mirrors the distinction between everyday medical practice under humoral health theory versus a dangerous repurposing of purgative knowledge. "Feticide" is not the legal issue for Hale: he does not invoke necessity doctrine that excuses the taking of one life (the fetus') if necessary to save another (the woman's) because a fetus was "not yet *in rerum naturae*" (translated literally as "in the nature of things," meaning "in existence," a status entered into at live birth).¹⁹³ Abortion that a

186. HALE, PLEAS OF THE CROWN, *supra* note 60, at 429–34; *see also* Rex v. Anonymous (1670) (the only recorded case of "abortion" over which Hale presided as judge), *summarized in* HALE, *id.* at 429–30.

187. HALE, PLEAS OF THE CROWN, *supra* note 60, at 432–33.

188. Within his section on the college of physicians in London, Coke specifies a therapeutic intent exception: "If one that is of the myserie of a physician take a man in cure and giveth him such physick as within three days he dye thereof, without any felonious intent, and against his will, it is no homicide." COKE, LAWS OF ENGLAND FOURTH, *supra* note 59, at 251 (*citing* 3 E.3 Coron. 163). Placing this discussion as he does, within ch. 50 ("Of the Courts and their Jurisdictions within the City of London . . ."), §16 ("The Jurisdiction etc. of the Colledge [*sic*] of Physicians in London etc."), Coke specifies this as the rule pertaining to "this noble city [i.e., London]." *Id.* at 251.

189. HALE, PLEAS OF THE CROWN, *supra* note 60, at 429.

190. *See supra* Part I.D.2.

191. HALE, PLEAS OF THE CROWN, *supra* note 60, at 429.

192. *Id.*

193. "If a woman be quick or great with child, if she take, or another give her any potion to make an abortion, or if a man strike her, whereby the child within her is *kild*, it is not murder nor manslaughter by the law of *England*, because it is not yet *in rerum naturae*, tho it be a great crime, and by the judicial law

woman survived, says Hale, was thus “not murder or manslaughter by the law of England.”¹⁹⁴ Hale’s doctrine is reminiscent of Bracton’s in its emphasis on patient protection. Hale states clearly that if a potion administered with intent to destroy a fetus,¹⁹⁵ even before quickening,¹⁹⁶ is so strong that it kills the patient, the medical practitioner bears the risk¹⁹⁷ of a murder charge even if the patient consented to it. Practitioners of his day routinely administered compounds to induce menstruation knowing they might expel a *conceptus* or *fetus*,¹⁹⁸ and “curative intent” encompassed this abortion practice and excluded it from the category of punishable offenses.¹⁹⁹ As Hale’s *Pleas of the Crowne*²⁰⁰ became a widely accepted working reference for lawyers and judges, his therapeutic intent doctrine became the standard statement of the common law on abortion.²⁰¹ In the rare event of an abortion prosecution²⁰² (when it occurred, typically for the danger post-quickening abortion posed to a woman²⁰³), a therapeutic defense shielded the good-faith care provider.

Accepted medical practice continued to permit fetal expulsion in the interest of the health of the pregnant person; this we can deduce from evidence of the prevalence of “medically indicated” abortion from a variety of sources. To take just one example, a review of virtually all major obstetrical texts published in England between 1734 and 1937 shows that, of sixty-two texts, only two did not condone inducing labor either before, or after, viability of the fetus for reasons

of *Moses* was punishable with death, nor can it legally be made known whether it were kild or not, 22 *E.3 Coron.* 263. So it is, if after such child were born alive, and baptized, and after die of the stroke given to the mother this is not homicide. 1 *E.3.* 23 *b. Coron.* 146.” *Id.* at 433.

194. *Id.*

195. “But if a woman be with child, and any gives her a potion to destroy the child within her, and she take it, and it works so strongly, that it kills her, this is murder, for it was not given to cure her of a disease, but unlawfully to destroy the child within her, and therefore he, that gives a potion to this end, must take the hazard, and if it kill the mother, it is murder, and so ruled before me at the assizes of *Bury* in the year 1670” *Id.* at 429–30.

196. *Id.* The phrase “with child” rather than “quick with child” distinguishes a pre-quickened from a quickened fetus.

197. In Hale’s phrase, the physician then “must take the hazard.” *Id.* at 430.

198. See *supra* Part I.C. *supra*.

199. Curative abortion in his day is not limited to emergency cases of, say, saving a woman from life-threatening labor. See *supra* Part I.A.

200. The earliest publication of Hale’s summary of case law doctrine appeared in 1682. HALE, *PLEAS OF THE CROWN*, *supra* note 60.

201. As evidence of the prominence of Hale’s treatise, the Boston Public Library’s copy is inscribed “John Adams 1760. John Quincy Adams 1800. George Washington Adams 1825.” *Frontspiece* of HALE, *PLEAS OF THE CROWN*, <https://archive.org/details/historiaplacitor01hale>; see also, e.g., JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* 207–08 (2006) [hereinafter DELLAPENNA, *DISPELLING MYTHS*] at 185 n.7, 207, 208 n.190 (citing Hale).

202. The medical profession concurred with this position. For example, in 1756, a London medical convocation decided it was justifiable to sacrifice an “unborn child” to save the life of a pregnant woman even during delivery. See L. A. PARRY, *CRIMINAL ABORTION* 9 (1932); see also MOHR, *ABORTION IN AMERICA*, *supra* note 22, at 30, 270 n.18.

203. Means, *Cessation of Constitutionality*, *supra* note 19, at 437.

related to the health of the pregnant woman.²⁰⁴

4. Health on the Verge of Modernity

To ask, “Was there a ‘health exception’ at common law?” is to raise an admittedly anachronistic question, transposing terms from our time onto another. The term “exception” wrongly assumes an abortion prohibition to which exception might be raised.²⁰⁵ The question also problematically presumes shared understandings of “abortion” across time. “Abortion,” in turn, presumes common grounds for understanding “pregnancy,” which entails its own complications. Thinking historically demands we suspend modern confidence about ascertaining pregnancy, a certitude not available to those of earlier times. More subtly, asking, “Was there a health exception at common law?” presumes a shared understanding of “health.” The importance of the “health exception” in current doctrine justifies investigation into its antecedents,²⁰⁶ but we entertain it knowing that, epistemically, we start on thin ice.

That said, considering conceptions of health, practices of medicine, and precepts of law, we can discern several domains of possible action for early modern patients and practitioners, subject to different legal doctrines.

a. Pre-Quickening: The Constructive Health Exception

Pre-quickening treatment to induce menses constituted one domain of possible action. As discussed above, not all instances of amenorrhea indicated pregnancy to early modern women.²⁰⁷ Treatment for amenorrhea, pre-quickening, might have been undertaken either with no suspicion of pregnancy or lack of clarity whether the amenorrhea correlated with pregnancy. Under dominant theories of health, it was incumbent on a responsible practitioner to induce menstruation if he or she diagnosed “retained menses” (or “obstructed menses,” as the condition came to be called in the United States).²⁰⁸

Legal historians have debated whether the common law permitted pre-quickening medical intervention. Proposing the “liberty” argument, Cyril Means asserts that women enjoyed a common-law liberty to abort at any point in pregnancy²⁰⁹ and the U.S. Supreme Court, persuaded, has sided with those who

204. KEOWN, ABORTION, DOCTORS, AND THE LAW, *supra* note 38, at 80–83.

205. To be clear: women themselves, not liable under the doctrine, are not prohibited recourse to abortion; practitioners are not liable except regarding those procedures posing greatest patient risk. *See supra* Part I.D.2. and Part I.D.3.

206. *See supra* text accompanying notes 11–16 (explaining the importance of the health exception in challenges to *Roe*).

207. *See supra* Part I.C.

208. *See, e.g.,* MOHR, ABORTION IN AMERICA, *supra* note 22, at 14, 268 n.27 (1978) (citing Walter Channing’s lectures in midwifery and diseases of women at Harvard Medical School (1821, 1822, and 1825–26)); *see also id.* at 6.

209. Means, *The Phoenix of Abortional Freedom*, *supra* note 19, at 336–37; Means, *Cessation of Constitutionality*, *supra* note 19, at 515. For the liberty argument, *see also*, for example, George, *Current Abortion Law*, *supra* note 170.

argue that abortion was not a crime at common law.²¹⁰

My research leads to framing this conclusion in a different way. Although I concur that at common law, a woman could terminate a pregnancy without facing legal consequence, I do not argue that the law “permitted” abortion in the administration of emmenagogues we now know cause fetal expulsion. Rather, in them, early modern common law did not even *see* abortion. It saw, instead, health practice. “Permission” is the wrong word. Either the law was blind to the commission of abortion in the administration of an emmenagogue to treat suppressed menses; or the law recognized the possible side effect of fetal expulsion but, considering amenorrhea a source of life-threatening humoral imbalance, the law actively supported so treating it. To apply this framing to our anachronistic question, I characterize this situation, wherein patients and health practitioners routinely conducted uterine purgations in the name of health and without interference from law, as a “constructive health exception.”

Although provoking menstruation was the most common pre-quickenening intervention, sometimes women and their care providers, even before quickening, suspected pregnancy and intervened to terminate it. They might have done so for health reasons, for example if a woman was in fragile health or suffered from certain pre-existing conditions thought to be incompatible with pregnancy. This, too, would fall under a “constructive health exception.”

Alternatively, they might have done so for birth control purposes. Indictment for pre-quickenening pregnancy termination was virtually unheard of, compared with its routine frequency. As a practical matter the law ignored it. Here, we can concur with Means’ conclusion that an “abortion liberty” doctrine controlled.

b. Post-Quickening: The Life-Health Defense

Even post-quickenening, it was not always clear whether pregnancy, illness, or both were at issue.²¹¹ What was clear was increasing risk over time: experts of the day warned that medical intervention—regardless of means or intent—posed

210. *Roe v. Wade*, 410 U.S. 113, 136 (1973) (“doubtful that abortion was ever firmly established as a common-law crime even with respect to destruction of a quick fetus.”). For historians’ accounts cited by the Supreme Court, see Means, *The Phoenix of Abortional Freedom*, *supra* note 19, at 336–37; Means, *Cessation of Constitutionality*, *supra* note 19, at 515. For later objections that Means erred and missed evidence from ecclesiastical courts, see DELLAPENNA, *DISPELLING MYTHS*, *supra* note 201 (arguing that prosecutions for abortion, because of evidentiary difficulties over protections against self-incrimination in the king’s courts, were brought in ecclesiastical courts); Joseph W. Dellapenna, *The History of Abortion: Technology, Morality, and the Law*, 40 U. PITT. L. REV. 359 (1979). For rebuttal of Dellapenna and defense of the common-law abortion liberty position, see Spivack, *Context of Abortion Law in Early Modern England*, *supra* note 160 (arguing that Dellapenna misreads the medieval record by misunderstanding abortion case law and terminology); see generally KEOWN, *ABORTION, DOCTORS, AND THE LAW*, *supra* note 38 (arguing, based on review and evaluation of extant early modern sources, that abortion was subject to but limited prosecution in ecclesiastical courts); R.H. Helmholtz, *Infanticide in the Province of Canterbury during the Fifteenth Century*, 2 HIST. CHILDHOOD Q. 379 (1975) (arguing that one group of early commentators was writing of canon law and another, of secular law, and thus did not directly contradict each other as some historians allege).

211. See *supra* Part I.A. and Part I.B.

greater danger to the woman the longer it had been since her last menstrual period.²¹² In an era before preventive asepsis, fail-proof anti-hemorrhagics, or antibiotics, later interventions risked her life. A responsible practitioner would have initiated a procedure only if the risk of inaction outweighed the risk of action; if the patient were to die, only the irresponsible practitioner would have been legally liable in homicide.²¹³ Post-quickening treatments, then, fell into several domains of possible action.

Post-quickening emmenagogue constituted one domain. Even after clear indications of pregnancy, which the law accepted as the perception of fetal movement by the pregnant woman (“quickening”),²¹⁴ some conditions called for emmenagogue. Even after quickening, administration of a substance thought of as an emmenagogue, or for an emmenagogic purpose (as with pre-quickening intervention), would fall under the “constructive health exception.”²¹⁵

Post-quickening treatment to terminate possible pregnancy constituted another possible domain of action. Contemporaneous legal authorities suggest a prevailing duty to intervene in post-quickening situations where the pregnant woman’s life was imperiled, with the protection of curative intent doctrine if her life was lost in the attempt.²¹⁶ In the case, say, of a peculiarly positioned or malformed fetus promising difficult delivery or dangerous pregnancy, legal doctrine favored therapeutic intervention.²¹⁷

Under practice conditions of the time, “saving life” was often inseparable from “saving health,” making the common-law “life exception” in practicality inextricably entangled with, and conceptually indistinguishable from, a “health exception.”²¹⁸ Here, “health” was subsumed under “life.” Absent a background abortion prohibition, it would be a mischaracterization to call the doctrine a life-health “exception.” Rather, the doctrine offered a defense from a charge of homicide in the case of patient death. Although acting to preserve health is eclipsed by life-and-death circumstances, we discern in legal doctrine a respect for those acting in the name of health—as a matter of practical legal reasoning, health operating in the penumbra of life—resulting in what I characterize as a “life-health defense.”

212. See, e.g., JOHN AITKEN, *PRINCIPLES OF MIDWIFERY, OR PUERPERAL MEDICINE* 72 (1784) (“The more advanced the pregnancy, the more dangerous the abortion, as great haemorrhage [sic] arises from the dilated state of the vessels”), available at GALE CENGAGE LEARNING Eighteenth Century Collection Online.

213. See *supra* Part I.D.

214. See *supra* Part I.B.

215. See *supra* Part I.D.4.a.

216. See *supra* Part I.D.2. and Part I.D.3.

217. See *supra* Part I.D.2.

218. Means reaches a similar conclusion, though he considers a more limited set of cases and evidence. He does not take into account abortion induced by potion or by external manipulation; but analyzing the law as applied to surgical abortion in the 1800s, he finds that quickening doctrine together with the absence of antiseptic surgery meant virtual equivalence of life and health exception. Means, *Cessation of Constitutionality*, *supra* note 19, at 435–37.

By the turn of the nineteenth century, then, a “constructive health exception” is the rule under which most medical interventions that we now know terminate pregnancy—the emmenagogues—took place. The “constructive health exception” applied to emmenagogic treatment regardless of whether it was undertaken before or after quickening. After quickening, in the event of patient death, the life-health defense protected the practitioner charged with patient homicide. Legal liability thus would only have attached to a small subset of procedures that we now understand as “abortion”: those undertaken to interrupt pregnancy, without curative intent, resulting in the death of the woman.

II. THE SHORT NINETEENTH CENTURY

Health, life, abortion: these terms continued in relative stability from the early decades of North American colonization into the 1800s until a period of intense change from 1820–1857 that I call “the short nineteenth century.” Before this period, early modern doctrines in health²¹⁹ and law²²⁰ imported to North America²²¹ persisted. During this period, however, in medicine the balance of power between discursive traditions fundamentally shifted. Empirical science rose; theories of humoral health began to fall.²²² This period also saw the first regulation of abortion by legislatures and thus the first statutory formulation of a health exception doctrine. Before 1820, no U.S. state had abortion legislation; by 1959, every state did.²²³ The flood of state abortion legislation hit in three waves—two in the “short nineteenth century”²²⁴ and the third, at its close.²²⁵ The first and second waves, the subjects of this Part, began out of a patient-protection motivation. The first set of state abortion laws mirrored changes in elite discourse (both scientific and legal) in the United Kingdom, but incorporate American caution towards developments in medicine and mercy towards well-intended practitioners. The second wave, although still largely emanating from a patient-protection impetus, was inspired by popular scandal rather than elite

219. See *supra* Part I.A. (describing a women’s health regime combining common knowledge of abortifacients with an ideology of health that promotes their employment).

220. See *supra* Part I.D.4. (describing legal doctrine tolerant of uterine purgatives and other abortion techniques).

221. See *infra* Part II.A.

222. As historian of medicine Charles E. Rosenberg summarizes, “Medical therapeutics changed remarkably little in the two millennia preceding 1800; by the end of the century, traditional therapeutics had altered fundamentally.” Charles E. Rosenberg, *The Therapeutic Revolution: Medicine, Meaning, and Social Change* [hereinafter Rosenberg, *Therapeutic Revolution*], in *SICKNESS AND HEALTH IN AMERICA: READINGS IN THE HISTORY OF MEDICINE AND PUBLIC HEALTH* 39, 39 (Judith Walzer Leavitt and Ronald Numbers eds., 2nd ed. 1985) [hereinafter Leavitt and Numbers, *SICKNESS AND HEALTH*].

223. See Eugene Quay, *Justifiable Abortion—Medical and Legal Foundations* (pt. 2), 49 GEO. L.J. 395, 447–520 (1961) [hereinafter Quay, *Justifiable Abortion*] (Appendix I listing, by state, abortion legislation passed by U.S. state legislatures between 1821 and 1960, with relevant statutory text).

224. See *infra* Part II.B. and Part II.C.

225. See *infra* Part III.

discourse. This Part summarizes some of the changes in thinking about health that define this period and redirected the course of the health exception.

Part II.A. describes the status quo in the United States at the beginning of the century.²²⁶ Part II.B., discussing the first wave of legislation, describes the implicit preservation of the life-health defense in U.K. abortion legislation and the health rationale behind the first U.S. legislation.²²⁷ Meanwhile, starting roughly in the second quarter of the nineteenth century, dramatic changes in providing medical care overshadowed a behind-the-scenes revolution in conceptions of health. Part II.C. describes how abortion became a vehicle for public discussion of these more general background changes, a discussion which itself produced the second wave of U.S. abortion regulation.²²⁸ This account of the short nineteenth century is admittedly not a progress narrative telling of a steady march towards efficacious care²²⁹ and wise law. It is, instead, a record of unsystematic and uncoordinated starts, stops, reversals, and shifts. In this messy record, some features of our contemporary options and dilemmas regarding abortion emerge. Through changes that gained momentum between 1820 and 1857, the “health exception” survived, but in different formulations, vulnerable to different interpretations.²³⁰

A. STATUS QUO ANTE: HEALTH, LIFE, ABORTION

In the United States, under the received theory of health,²³¹ amenorrhea posed particular danger,²³² and for American women through the colonial period and into the mid-nineteenth century, as in England, it was fraught with indeterminacy. If it coincided with pregnancy, fetal growth could absorb harmful residues that, if left alone to accumulate, caused humoral imbalance and disease.²³³ Otherwise, amenorrhea was understood to cause a number of pathologies,²³⁴ and “obstructed menses” demanded remedies to “restore menstrual flow.”²³⁵

226. See *infra* Part II.A.

227. See *infra* Part II.B.

228. See *infra* Part II.C.

229. In this, I found historian Charles Rosenberg had come to a similar view. See, e.g., Rosenberg, *Therapeutic Revolution*, *supra* note 222, at 39 (arguing against a presumption of studying the history of medicine in the nineteenth century).

230. See *infra* Part II.C.

231. Under the going theory, every part of the body relates with every other in a holistic system of “intake and outgo” that must remain in balance for a person to enjoy health. Rosenberg, *Therapeutic Revolution*, *supra* note 222, at 40. “A distracted mind could curdle the stomach; a dyspeptic stomach could agitate the mind.” *Id.*

232. See *supra* Part I.A.2.

233. See *supra* Part I.A.3.

234. See *supra* Part I.A.3.

235. See, e.g., MOHR, ABORTION IN AMERICA, *supra* note 22, at 14 (citing Walter Channing’s lectures on women’s health and gynecology at Harvard Med. School in the early 1820s); see also *id.* at 6. My main departure from Mohr is that he apparently reads the “obstructed menses” diagnosis of the first half of the nineteenth century primarily in a mechanical, not humoral, sense and thus seems to misinterpret medical response to the diagnosis as attempts literally to “unblock,” rather than induce, menstruation. *Id. Contra*

Into these Old World conceptions of health, the New World introduced some differences in practice. A new mix of populations and bodies of knowledge added Native American²³⁶ and African²³⁷ pharmacopeia and procedures to the array of European treatments to provoke menses or terminate pregnancy.²³⁸ Dispersed patterns of settlement and absence of formal medical education in the U.S. more often put the practice of medicine in the hands of local herbalists or the patient herself. The home medical manual²³⁹ became a common source for self-diagnosis and treatment.²⁴⁰ Those in more settled areas also had access to midwives, “Indian doctors,” and other experienced practitioners, but caregivers

Mohr, *see* REAGAN, WHEN ABORTION WAS A CRIME, *supra* note 22, at 8–9 (briefly describing humoral health practice to restore menstruation and urging current-day readers to take seriously nineteenth-century beliefs in “blocked menses”); LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD, *supra* note 22, at 16–17 (in discussion of gynecological practice and abortion, alluding to “a model of illness” in the first third of the nineteenth century “that called upon the use of drastic medical treatments such as bleeding or the administration of hash laxatives and emetics.”).

236. *See, e.g.*, Peter Smith, *The Indian Doctor's Dispensary, Being Father Peter Smith's Advice Respecting Diseases and Their Cure* (1813), reproduced in 2 BULL. LLOYD LIBR. OF BOTANY, PHARMACY, AND MATERIA MEDICA, 46–47 (J.U. Lloyd ed., Reproduction series #2, 1901) [hereinafter Smith, *Indian Doctor's Dispensary*] (prescribing snake root, also known as seneca); *see also* BENJAMIN RUSH, OBSERVATIONS ON THE DUTIES OF A PHYSICIAN, AND THE METHODS OF IMPROVING MEDICINE 11 (pamphlet of speech to Philadelphia medical graduates, 1789) [hereinafter RUSH, IMPROVING MEDICINE] (recommending to medical students in Philadelphia the American pharmacopeia unknown in the Old World including ipecacuana and seneca) available at GALE CENGAGE LEARNING Eighteenth Century Collection Online; Joseph Jouvency, “Concerning the Country and Manners of the Canadians, or the Savages of New France” (Acadia 1610-1613), in 1 JESUIT RELATIONS AND ALLIED DOCUMENTS 277 (Reuben Gold Thwaites ed., 1896-1901), cited in Ann Marie Plane, *Childbirth Practices Among Native American Women of New England and Canada, 1600-1800*, in Leavitt, WOMAN AND HEALTH, *supra* note 144, at 42.

237. *See, e.g.*, RUSH, IMPROVING MEDICINE, *supra* note 236, at 10 (advising graduating American medical students in pursuit of medical knowledge to converse with “nurses and old women” and to inquire of “Negros and Indians” regarding discoveries in medicine.); MOHR, ABORTION IN AMERICA, *supra* note 22, at 6 (describing cotton root and other abortifacient knowledge commanded by Africans brought to the Americas). Although treatment of abortion in Native American and African law awaits further research, the prevalence of abortifacient knowledge among indigenous Native American and resettled Africans leads us to infer its acceptance in legal traditions of non-European populations significant in colonial America.

238. Some of the New World prescriptions and procedures differed from the balance-restoring or dual-use humoral treatments in that they had a distinctly contraceptive aim. *See, e.g.*, Thomas Jefferson, *Response to Query VI, A Notice of the mines and other subterraneous riches, its trees, plants, fruits, &c.*, in NOTES ON THE STATE OF VIRGINIA (1787) (1781), available at http://avalon.law.yale.edu/18th_century/jeffvir.asp (reporting Native Americans raise fewer children than descendants of Europeans not because of “a difference of nature, but of circumstance,” as “child-bearing becomes extremely inconvenient to them . . . it is said that they have learnt the practice of procuring abortion by the use of some vegetable.”).

239. *See, e.g.*, S.K. JENNINGS, THE MARRIED LADY'S COMPANION, OR POOR MAN'S FRIEND (1808) [hereinafter JENNINGS, LADY'S COMPANION], excerpted in ROSE, ABORTION DOCUMENTARY GUIDE, *supra* note 25, at 1–2; *see also, e.g.*, *Letter to Ladies* (1817), cited in MOHR, ABORTION IN AMERICA, *supra* note 22, at 6.

240. *See* MOHR, ABORTION IN AMERICA, *supra* note 22, at 6 (arguing the importance of home medical manuals in early nineteenth century U.S. health care). For examples of such manuals addressing gynecological health, *see id.* (citing DOMESTIC MEDICINE (1782)) (the most commonly consulted home manual); JENNINGS, LADY'S COMPANION, *supra* note 239, at 1 (giving straightforward recommendations for dealing with “a common cold,” a nineteenth-century euphemism for missing a period). The American home manuals, continuing the classificatory schemata of predecessor humoral manuals, commonly

with formal medical education or those using commercial preparations were rare.²⁴¹ Contemporaneous writers remarked on how common herbal remedies for amenorrhea were in the U.S., some straightforwardly acknowledged to “destroy the fetus in utero.”²⁴² Humoral purgatives were effective; without expert guidance, self-treatment was far from risk-free,²⁴³ and misused purgatives could be lethal.²⁴⁴ Pregnancy itself was an uncertain business.²⁴⁵

In the ambiguity inhering in diagnosis of “obstructed menses” versus “pregnancy,” the law tolerated medical intervention before quickening.²⁴⁶ After quickening, as in early modern England, the law ignored measures intended to provoke menstruation under a “constructive health exception.”²⁴⁷ Indictment for abortion was practically restricted to after-quickening procedures to destroy a fetus that resulted in the death of the woman carrying it.²⁴⁸ With the “life-health doctrine” providing an affirmative defense, convictions on such charges were

separate abortifacient compounds into one section for treating “obstructed menses” and another, for abortion. MOHR, ABORTION IN AMERICA, *supra* note 22, at 6.

241. Benjamin Rush offers a prominent example of that rarity, a formally trained physician in the early history of the United States: native of Pennsylvania, educated at the College of New Jersey (now Princeton) and at medical college in Edinburgh, Scotland, practitioner in Philadelphia as well as political activist and signer of the Declaration of Independence. BENJAMIN RUSH, A MEMORIAL CONTAINING TRAVELS THROUGH LIFE OR SUNDRY INCIDENTS IN THE LIFE OF DR. BENJAMIN RUSH (Louis Alexander Biddle ed., 1905) (1813), <https://archive.org/details/memorialcontaini00rush>.

242. See, e.g., Smith, *Indian Doctor's Dispensary*, *supra* note 236. For further discussion of the prevalence of emmenagogues and abortifacients in U.S. health practice at this time, see, for example, LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD, *supra* note 22, at 18–19.

243. See, e.g., Center for Disease Control, *Fatality and Illness Associated with Consumption of Pennyroyal Oil—Colorado*, 27 MORBIDITY & MORTALITY WKLY. REP. 511 (Dec. 22, 1978), <http://stacks.cdc.gov/view/cdc/1654> (reporting, in 1978, three unrelated deaths of women in Colorado from unsupervised self-dosing with humoral recipes containing pennyroyal).

244. See, e.g., *Carter v. State*, 2 Ind. 617 (May 1851) (after death of Marilla Reed, convicting her boarder of her accidental death by overdose, without medical advice, with the purgative arsenic and the abortifacient ergot.); see also, e.g., *Comm. ex rel. Chauncey & Nixon v. Keeper of Prison*, 2 Ashm. 227, 231 (Philadelphia County, 1838) 227, 230 (describing a woman's death from abortifacient purgatives in a Pennsylvania case).

245. Recent reassessment of nineteenth-century records shows maternal mortality averages for those assisted by midwives is significantly lower than for those attended by a formally trained physician. See Laurel Thatcher Ulrich, *The Living Mother of a Living Child': Midwifery and Mortality in Postrevolutionary New England* [hereinafter Ulrich, *Midwifery and Mortality*] in Leavitt, WOMAN AND HEALTH, *supra* note 144.

246. For discussion of common-law doctrine that tolerates the practice, see *supra* Part I.D.4, and for an instance of its application in the United States, see, for example, *Commonwealth v. Bangs*, 9 Mass. 387, 388 (1812) (reciting common law doctrine in dismissing charge of attempted abortion against Isaiah Bangs on grounds quickening not proved).

247. For an argument for considering part of the common-law doctrine a “constructive health exception,” see *supra* Part I.D.4.a. (summarizing doctrine and suggesting for retrospective purposes it be considered a constructive health exception); for a summary of some of the implications of applying this doctrine in the United States, see LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD, *supra* note 22 at 13–14 (describing how, in “American legal and moral practice at the beginning of the nineteenth century . . . early abortions were legally ignored”).

248. See, e.g., Means, *The Phoenix of Abortional Freedom*, *supra* note 19; Means, *Cessation of Constitutionality*, *supra* note 19.

even rarer.²⁴⁹ However, a wave of statutory innovation set to break on American shores threatened this state of tolerance.

B. THE FIRST WAVE: REGULATION ENTERS STATUTE

1. Statute in the U.K.: Ratifying Science, Criminalizing Abortion, Encoding Health Exception

A health “exception” requires an abortion prohibition, and in 1803 U.K. law lords provided just that. At the same time that practice in the U.S. perpetuated pre-existing theories and treatments of humoral health, in Europe investigations in biological science began to challenge prevailing understandings among knowledge elites and thence to influence law. In the seventeenth century, William Harvey, an English physician conducting training lectures with dissections, reconceived the theory of circulation of the blood.²⁵⁰ Harvey’s findings challenged basic premises of Galenic physiology, over time gradually eroding belief in the mechanics upon which Galenic theories of humors and health rest.²⁵¹ Harvey’s method of investigation, meanwhile, was part of a wider trend of empiricism that shifted medical thought from humoral doctrine towards a new theory of health.²⁵² This revolution in health theory turned treatment doctrines away from keeping humors in holistic balance, and towards “localized treatments” targeting newly conceived “systems” (like Harvey’s “circulatory system”²⁵³ or the “reproductive system”) or discrete organs as loci of disorders or infection.

Abandoning humoral theory did not happen all at once with a moment of discovery or declaration of a new day. Rather, we can trace this slow and often unconscious process by its footprints. Take, for example, the organization of instruction at the medical college of Glasgow, Scotland. In 1704, when humoral theory still prevailed, the college opened a “physic garden” for medicinal plants and appointed John Marshall, a Glasgow surgeon, keeper of the garden and instructor of botany to the medical students.²⁵⁴ In 1790, when James Jeffray assumed the professorship, it was still a chair of anatomy and botany,²⁵⁵ a combination that makes sense under humoral theories of health. Jeffray

249. Dayton, *Taking the Trade*, *supra* note 144, at 12 (finding record of only one, for a death from abortion by instrument, in colonial American court archives, and describing the case in the death of Sarah Grosvenor from after-effects of an intrusive procedure by male doctor after his potion failed to procure abortion). Dayton also ascribes covert abortion in colonial America, when, before quickening, it was legal, to shame of the discovered sin of sex outside of marriage. Dayton, *id.*, at 14.

250. WILLIAM HARVEY, *THE CIRCULATION OF THE BLOOD AND OTHER WRITINGS* (Kenneth J. Franklin trans., London: Orion Publishing Group ed. 1993) (1628) [hereinafter HARVEY, *CIRCULATION OF THE BLOOD*]; see generally G. WHITTERIDGE, *WILLIAM HARVEY AND THE CIRCULATION OF THE BLOOD* (1971).

251. Henry and Forrester, *Introduction to the Physiologia of Jean Fernel*, *supra* note 62, at 5.

252. *Id.* at 2; see also *infra* Part III.C.

253. See generally HARVEY, *CIRCULATION OF THE BLOOD*, *supra* note 250.

254. COMRIE, *HISTORY OF SCOTTISH MEDICINE*, *supra* note 68, at 519.

255. *Id.* at 520.

continued to conduct lectures for several years in the garden,²⁵⁶ but by 1800 he had dropped botany, left the garden, and switched to the dissecting room to teach anatomy.²⁵⁷ When Allen Thomson succeeded Jeffray, the chair was only anatomy, not anatomy and botany; Thomson's teaching load was anatomy and physiology with research interests in embryology.²⁵⁸ By 1810 the medical college's "physic garden" had fallen into disuse; the university later replaced it with a garden for botanical research outside the city, removed from the medical college,²⁵⁹ and in 1831, the university built a chemistry lab.²⁶⁰ From medical college garden to dissecting room; from plants, anatomy, and botany to cadavers, organs, and chemistry: these are signs of the abandonment of humoral doctrine.

As thinking in health shifted from humoral to locational theories, empiricism also drove science to divorce the Aristotelian premise of continuous *in utero* development from its theories of animation and the soul. While embryology yielded more fine-grained data about fetal development,²⁶¹ science's impulse towards bright-line distinctions and generalization favored pointing to conception as the starting point of human "life." Such a move erased the earlier distinction between *conceptus* to *fetus*, and the idea of individual development along a continuum eventually to include animation and ensoulment.²⁶² Samuel Farr, in his *Elements of Medical Jurisprudence* (1788), summarized the resulting reconception of "life" and argued for legal change in response. "Life," Farr wrote, "begins . . . immediately after conception. Hence those seem to err 1st who would persuade us, that the foetus acquires life when it is so particularly active, that the mother becomes sensible of its motions."²⁶³ In a statement reflecting prior thinking about animation and its relation to vitality, together with new thinking about conception and life, Farr then encompassingly reasoned:

256. *Id.*

257. *Id.*

258. *Id.* at 522.

259. *Id.* at 520.

260. COMRIE, HISTORY OF SCOTTISH MEDICINE, *supra* note 68, at 522–23.

261. See, e.g., CASPAR FRIEDRICH WOLFF, DE FORMATIONE INTESTINORUM (J.C. Dupont & J.L. Perrin eds., Brepols 2003) (1768-1769) (furthering epigenetics' argument against preformationism by demonstrating that the chick intestine forms by the folding of tissue that detaches from the embryo's surface); SAMUEL THOMAS SOEMERRING, ICONES EMBRYONUM HUMANORUM (Varrentrapp und Wenner, Frankfurt am Main ed., 1799) (illustrating an early connected series of human development by drawings of human embryos from his collection of mostly aborted material); KARL ERNST VON BAER, ÜBER ENTWICKELUNGSGESCHICHTE DER THIERE [ON THE DEVELOPMENTAL HISTORY OF ANIMALS] 4–7 (1828) (in contrast to the Aristotelian idea of individual variation regarding the pace of *in utero* development, proposing a scheme of "normal development," the "most usual" under favorable conditions). On Soemmering, see Lorraine Daston and Peter Galison, *The Image of Objectivity*, 40 REPRESENTATIONS 81–128 (proposing that Soemerring, typical of scientific illustrators of his time, sought to see beyond mere individuals to represent types). On Baer, see Nick Hopwood, *A History of Normal Plates, Tables, and Stages in Vertebrate Embryology*, 51 INT'L J. DEV. BIO. 1 (2007). On the history of embryology, see generally JOSEPH NEEDHAM, A HISTORY OF EMBRYOLOGY (1934).

262. See *supra* Part I.B.

263. SAMUEL FARR, ELEMENTS OF MEDICAL JURISPRUDENCE 26 (Smith and Davy 3rd ed. 1815) (1788) [hereinafter FARR, ELEMENTS OF MEDICAL JURISPRUDENCE].

. . . as such beings might live, and become of use to mankind, and as they may be supposed from the time indeed of conception, to be living animated beings, there is no doubt but the destruction of them ought to be considered as a capital crime.²⁶⁴

British legislators soon ratified this sense in Lord Ellenborough's Act, the first Anglophone statute to regulate abortion.²⁶⁵ Surprisingly, given its eventual fame for criminalizing abortion, abortion did not figure prominently in its first draft,²⁶⁶ occurring merely as a narrow provision in a poison-control section. Homicide by poison had long raised concern as an attack difficult to detect and its victims, to treat.²⁶⁷ This measure prohibiting poison to induce miscarriage after quickening²⁶⁸ followed the spirit of earlier patient-protection doctrines.²⁶⁹

During the process of revising the draft bill, however, life science exerted its influence, and Lord Ellenborough (also Chief Justice of the King's Bench at the time),²⁷⁰ his merciless rigor.²⁷¹ In response to objections²⁷² that the bill failed to

264. *Id.* at 74. *But see id.* at 28–9 (admitting “a foetus can not live out of the womb of its mother,” proposing criteria for determining “what kind of children, when born” should be “deemed endowed with life,” and concluding upon seven months after conception should they enjoy a presumption of life).

265. Lord Ellenborough's Act, 43 Geo. 3 ch. 58, *reprinted at* https://en.wikisource.org/wiki/Lord_Ellenborough's_Act_1803. For further discussion of the relationship between embryology and Lord Ellenborough's Act, *see* KEOWN, ABORTION, DOCTORS, AND THE LAW, *supra* note 38, at 15.

266. Abortion does not appear in the title or the preamble. The Act's long title was “An Act for the further prevention of malicious shooting, stabbing, cutting, wounding, and poisoning, and also for the malicious setting fire to buildings, and also for repealing a certain Act, made in the first year of the late King James the first, intituled ‘An Act to prevent the destroying and murdering of bastard children,’ and for substituting other provisions in lieu of the same.” Lord Ellenborough's Act long title and Preamble, *reprinted at* https://en.wikisource.org/wiki/Lord_Ellenborough's_Act_1803.

267. *See, e.g.,* COKE, LAWS OF ENGLAND FOURTH, *supra* note 59, at 252 (singling out poisoning water for special sanction).

268. For progress of the Bill in the House of Lords, *see* 44 H.L. JOUR. 111, 151, 156, 170, 172, 187, 256 (1802–1804), *cited in* KEOWN, ABORTION, DOCTORS, AND THE LAW, *supra* note 38, at 175 n.77; for progress in the House of Commons, *see* 58 H.C. JOUR. 424, 514, 516, 513, 543 (1802–1803) *cited in* KEOWN *supra* at 175 n.78.

269. *See, e.g., supra* Part I.D.2. (discussing Bracton's poison prohibition); *see also supra* Part I.D.2. (discussing the duty to save); *supra* Part I.D.4. (characterizing common-law treatments as a “constructive health” doctrine and a “life-health defense”). One part of the bill even restores the presumption of innocence for a woman reporting stillbirth of an illegitimate child: an earlier law that is referenced in the long-form title of Lord Ellenborough's Act [i.e., “a certain Act, made in the first year of the late King James the first, intituled ‘An Act to prevent the destroying and murdering of bastard children’”] had reversed the common-law presumption of innocence of a mother at stillbirth, if the child would have been illegitimate. The 1803 Act restored it. Lord Ellenborough's Act, 43 Geo. 3 ch. 58, *text reprinted at* https://en.wikisource.org/wiki/Lord_Ellenborough's_Act_1803.

270. KEOWN, ABORTION, DOCTORS, AND THE LAW, *supra* note 38, at 19.

271. For an example of Lord Ellenborough's project of systematizing criminal law and of facilitating criminal prosecutions, *see* 36 Parl. Hist. Eng. 1245 (1803) (Ellenborough stating the bill aims “to generalize the law with regard to certain penal offenses, and to adapt it equally to every part of the United Kingdom”); *see also, generally,* KEOWN, ABORTION, DOCTORS, AND THE LAW, *supra* note 38, at 13–17 (explaining Ellenborough's revisions to eliminate disparities in criminal law between Ireland and the rest of the U.K and modify doctrine to facilitate prosecutions). On Ellenborough and his reputation for

incorporate new scientific thinking related to conception and human life,²⁷³ the Lords added a new category, “pre-quickening abortion,” at first as a misdemeanor,²⁷⁴ raised in revision to a felony.²⁷⁵ They made post-quickening abortion a capital crime,²⁷⁶ and Ellenborough added attempt offenses, relieving prosecutors of the burden of proving pregnancy.²⁷⁷ An offender needed only to have acted with the intent of causing miscarriage, regardless of whether the woman was actually pregnant, to incur criminal liability.²⁷⁸ This assault on the “quickening” distinction, anticipating a similar move in the United States sixty years later,²⁷⁹ nonetheless fell short of blanket criminalization. The key was intent doctrine.

As finally passed, the statute criminalized “wilfully and maliciously,”²⁸⁰ administering a substance with intent to procure miscarriage before quickening or “wilfully, maliciously, and unlawfully” doing so after quickening.²⁸¹ Historian John Keown proposes that those terms, encoding the statute’s intent element, survived subsequent revisions of the criminal statute to become U.K. courts’ vehicle for preserving prior common-law doctrine on therapeutic intent.²⁸² (The use of these terms, and the statute’s intent doctrine, foreshadowed and influenced

irascibility and mercilessness, see *Entry for Law, Edward, first Baron Ellenborough*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, <http://www.oxforddnb.com/view/article/16142>.

272. For discussion of this point, see KEOWN, ABORTION, DOCTORS, AND THE LAW, *supra* note 38, at 22–24.

273. See, e.g., FARR, ELEMENTS OF MEDICAL JURISPRUDENCE, *supra* note 263.

274. For progress of the Bill in the House of Lords, see 44 H.L. JOUR. 111, 151, 156, 170, 172, 187, 256 (1802–1804), *cited in* KEOWN, ABORTION, DOCTORS, AND THE LAW, *supra* note 38, at 175 n.77; for progress in the House of Commons, see 58 H.C. JOUR. 424, 514, 516, 513, 543 (1802–1803) *cited in* KEOWN *supra* at 175 n.78.

275. Lord Ellenborough’s Act, 43 Geo. 3 ch. 58, § 2, *Act reprinted at* https://en.wikisource.org/wiki/Lord_Ellenborough's_Act_1803.

276. Lord Ellenboroughs Act, § 1.

277. KEOWN, ABORTION, DOCTORS, AND THE LAW, *supra* note 38, at 15.

278. *Id.*

279. See Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 287 [hereinafter Siegel, *Reasoning from the Body*]; see also *infra* Part III.A.

280. Lord Ellenborough’s Act, § 2 (regarding pre-quickening abortion).

281. Lord Ellenborough’s Act, 43 Geo. 3 ch. 58, § 1 (regarding post-quickening abortion), *reprinted at* https://en.wikisource.org/wiki/Lord_Ellenborough's_Act_1803.

282. The core of the intent provisions survived revision and, in that survival, bolstered the therapeutic intent defense. KEOWN, ABORTION, DOCTORS, AND THE LAW, *supra* note 38, at 27 n.2. (citing the 1837 successor act, Offenses Against the Person Act § 6, that abolished the death penalty for abortion and preserved the requirement that to be punishable, an act be done “unlawfully”); *id.* (citing the 1846 draft revision of criminal law, including on abortion and the intent provision, Parl. Pap. 24 (Commissioners for Revising and Consolidating the Criminal Law ed., 1846)) that proposed in relevant part, “. . . no Act . . . shall be punishable when such act is done in good faith with the intention of saving the life of the mother whose miscarriage is intended to be procured”); *id.* at 167 (Appendix I) (reprinting relevant sections of the revised criminal law as finally adopted, The Offenses Against the Person Act of 1861, that stipulate to be punishable, an abortion must be done “unlawfully”). For discussion of the 1846 draft revision, exempting from punishment an act done with the intent of saving the life of the mother, see also Davies, *Necessity*, *supra* note 170, at 126.

U.S. law.²⁸³) “Unlawfulness” was already familiar in homicide doctrine.²⁸⁴ Hale had distinguished abortion with intent to cure or prevent disease in a woman from abortion with intent to destroy the child within her, only characterizing the latter as “unlawful.”²⁸⁵ Courts interpreting Lord Ellenborough’s Act and its successors distinguished “lawful” abortion²⁸⁶ in a way that preserved the common-law life-health defense and protected practitioners who acted with therapeutic intent.²⁸⁷ Juries were instructed accordingly.²⁸⁸ “Malice,” another element from the statute, was also already a familiar (if confusing) term.²⁸⁹ “Malice aforethought,” premeditated ill-intent, in criminal doctrine was the element distinguishing murder from manslaughter.²⁹⁰ Prosecutors subsequently assured physicians in official correspondence that the law did not forbid abortion necessary to save a pregnant woman’s life,²⁹¹ and legal experts distinguished non-criminal abortion

283. See *infra* Part III.

284. COKE, LAWS OF ENGLAND FOURTH, *supra* note 59, at 251. Blackstone, elaborating on Coke’s doctrine, had defined “unlawfulness” in regard to homicide as “killing without warrant or excuse.” WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: BOOK THE FOURTH, ch. 14, 196 (1765–1769), http://avalon.law.yale.edu/18th_century/blackstone_bk4ch14.asp [hereinafter BLACKSTONE, COMMENTARIES].

285. HALE, PLEAS OF THE CROWN, *supra* note 60, at 429; see also *supra* Part I.D.3.

286. See, e.g., *R. v. Wilhelm*, 17 MED. TIM. GAZ. 658 (1858)) (judge admits the possibility of a “lawful cause” for attempted abortion), *cited in* KEOWN, ABORTION, DOCTORS, AND THE LAW, *supra* note 38, at 53, 182 n.29; *R. v. Bell* [1929], 1 BRIT. MED. J. 1061 (judge states certain operations to terminate pregnancy in its last stages to save patient’s are legal and necessary), *cited in* KEOWN, *supra*, at 53, 182 n.27; see also, e.g., *R. v. Bourne*, 1 K.B. 687, 3 ALL E.R. 615, L.R. 471 (Central Criminal Court [U.K.]) (judge upholds defense submission to amend indictment to include the word “unlawfully,” adding to elements Crown prosecutors have to prove), *cited in* KEOWN *supra* at 51, 182 n.11.

287. See generally KEOWN, ABORTION, DOCTORS, AND THE LAW, *supra* note 38 (arguing courts interpreted statutes’ intent language to permit therapeutic abortions).

288. See, e.g., *R. v. Wilhelm*, 17 Med. Tim. Gaz. 658 (1858)) (judge instructs jury that to convict it must be satisfied that defendant used “an unlawful instrument for an unlawful purpose”), *cited in* KEOWN, ABORTION, DOCTORS, AND THE LAW, *supra* note 38, at 52; *R. v. Collins*, 2 BRIT. MED. J. 59, 122, 129 (1898)) (in murder trial of medical practitioner charged with using an instrument to procure abortion, judge instructs jury that in some cases “forcible miscarriage” is necessary to save the patient’s life and “a properly qualified doctor had to say when that time had arrived. That was not unlawful.”), *cited in* KEOWN, *supra* at 52; *Death after operation to terminate pregnancy*, 2 BRIT. MED. J. 549, 550 (1933) (at inquest into possibility of wrongful death, coroner instructs jury that where surgical abortion was medically indicated in view of attending physicians, felonious intent could “of course” be ruled out), *cited in* KEOWN, *supra* at 53.

289. See, e.g., *The People v. William Enoch*, 13 WEND. 159, 167 (N.Y. Dec. 1834) (court trying to make sense of common-law element of malice in context of altered terms in revised criminal code).

290. See COKE, LAWS OF ENGLAND FOURTH, *supra* note 59. Blackstone asserts that the law may imply “malicious” intent even where none is expressed, iconoclastically giving unintended death of a woman from violently efficacious abortion medicine as an example. BLACKSTONE, COMMENTARIES, *supra* note 284, at 201.

291. Sir Edward Clarke Q.C. & Horace Avory, *Opinion of Q.C. on Abortion for Purpose of Saving Life of Mother, Requested by Royal College of Physicians (1895)*, in TAYLOR’S PRINCIPLES AND PRACTICE OF MEDICAL JURISPRUDENCE 154 (F.J. Smith ed., 5th ed. 1905)) (Queen’s Counsel, regarding a request for opinion on abortion from Royal College of Physicians, responded, “the law does not forbid the procurement of abortion during pregnancy, or the destruction of the child during labour, where such procurement or destruction is necessary to save the mother’s life.”). For background on this opinion and

for doctors.²⁹² In short, even after statutory “criminalization,” British case law followed the common-law rule that medically necessitated abortion was not punishable. The courts found a life-health exception in statutory prohibitions that criminalized only “malicious” or “unlawful” acts to procure miscarriage.

2. Statute in the United States: Protecting Patients

The abortion criminalization thrust of Lord Ellenborough’s Act initially found no reception in the U.S.²⁹³ When eventually emulated, it was patient protection that inspired state criminal code revisers. The first wave of U.S. abortion regulation worked towards what we might somewhat anachronistically characterize as “consumer protection,” either in poison control (covering only a subset of potional abortion)²⁹⁴ or malpractice protection.²⁹⁵ The health exception survived in both; I propose that health preservation motivated both.

a. *Poison and Consumer Protection*

The first statutory regulation of abortion in the U.S. came in 1821 when Connecticut Revisers, in a new section of the state criminal code against murder by poisoning, included a clause making administering poison with intention to cause post-quickening miscarriage punishable.²⁹⁶ Far from a blanket criminalization of abortion, the Connecticut provision only covered “poison,” not all potions that induce miscarriage (and, only targeting a second party, exempted the woman herself from liability).²⁹⁷ It made no explicit health exception, but implicitly encoded the logic of the common-law life-health defense in an intent element requiring “poison” be administered “willfully and maliciously.”²⁹⁸ Although not technically a “defense,” it embedded the logic of the antecedent defense in the very definition of the elements of the offense, carving out an implicit therapeutic exception. Timing was important. Inducing miscarriage of a “known” pregnancy—

on the intent provision interpreted for medical care providers, see KEOWN, ABORTION, DOCTORS, AND THE LAW, *supra* note 38, at 54.

292. See e.g., *The Ethical, Legal, and Medical Aspects of Abortion*, 1 LANCET 230–231 (1927)) (in joint meeting of Medico-Legal Society and obstetrics section of Royal Society of Medicine, Justice Humphreys distinguished non-criminal abortion as “steps taken by a qualified medical man to get rid of a condition in his patient which he considered, using the best of his skill and ability, and of course honestly, on medical grounds and on medical grounds alone, to be dangerous to the safety of his patient.”), *discussed in* KEOWN, ABORTION, DOCTORS, AND THE LAW, *supra* note 38, at 54–55, 183 n.32–36, 38–39.

293. See, e.g., *Commonwealth v. Bangs*, 9 Mass. 387, 388 (1812) (reciting common law doctrine in dismissing charge of attempted abortion on grounds that even “if an abortion had been alleged and proved to have ensued,” “averment that woman was quick with child is a necessary part of the indictment,” i.e., excluding any wider attempt doctrine).

294. See *infra* Part II.B.2.a.

295. See *infra* Part II.B.2.b.

296. CONN. GEN. STAT. tit. 22, §§ 14, 16, at 152, 153 (1821); see also MOHR, ABORTION IN AMERICA, *supra* note 22, at 21–22 (describing the poison-control aspects of the Connecticut statute).

297. tit. 22, §§ 14, 16.

298. tit. 22, §§ 14, 16. For discussion of the Connecticut legislation, see also N.E.H. HULL & PETER CHARLES HOFFER, ROE V. WADE: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY 21 (2001) [hereinafter HULL & HOFFER, ABORTION RIGHTS IN AMERICAN HISTORY].

i.e., post-quickening—required an essentially noxious substance (like arsenic) or a more toxic quantity of an herbal purgative, administered during a period of pregnancy of heightened risk of serious hemorrhage, all regarded as a threat to a woman's health and life.

Two states, Missouri in 1825 and Illinois in 1827, followed Connecticut's lead, amending criminal poisoning provisions to include attempting miscarriage through poison.²⁹⁹ Their omission of reference to "quickening," Mohr suggests, evidences that in the United States, "the quickening distinction was taken completely for granted rather than any effort to eliminate it."³⁰⁰ Punishment was aimed at those who peddled poisons with the promise of procuring miscarriage.³⁰¹ By 1857, six jurisdictions had adopted their first abortion regulation with reference to poison.³⁰²

b. Malpractice, Consumer Protection, and the Explicit Exception

In the same decade that revisers in Connecticut took up poison control, in New York, formally trained physicians (referred to as "regulars") began to advocate legislated regulation of medicine. By the mid-1820s, they controlled, through the speaker of the state assembly, appointments to the standing committee on medical practice.³⁰³ To licensing procedures that had existed since the 1790s,³⁰⁴ in 1827 the New York legislature added a provision making unauthorized practice of medicine a misdemeanor, the toughest medical-practice control regulation in

299. An Act Concerning Crimes and Punishments ch. 1, 1825 1 Mo. Rev. Laws ch. 1, § 78, 281, 283 (Act of Feb. 12, 1825) (including in Criminal Code section on administering poison "or other noxious, poisonous, or destructive substance" with intention to murder, administering the same with intention to cause or procure "miscarriage" of a woman with child); An Act Relative to Criminal Jurisprudence, div. 5, 1827 Ill. Rev. Laws, Criminal Code, div. 5, § 46, at 124, 131 (Act of Jan. 6, 1827) (including in Criminal Code section on administering or causing to be taken poison "or other noxious or destructive substance" with intention to "cause the death, doing the same with intention to "procure the miscarriage" of a woman with child).

300. MOHR, ABORTION IN AMERICA, *supra* note 22, at 26.

301. HULL & HOFFER, ABORTION RIGHTS IN AMERICAN HISTORY, *supra* note 298, at 20. ("Prosecutions occurred only when a woman died or suffered grievous harm through the abortionist's recklessness or negligence.").

302. In order of adoption, statutes regulating abortion in reference to poison before 1857 are: CONN. GEN. STAT. tit. 22, §§ 14, 16, at 151, 152–53 (1821); 1825 1 Mo. Rev. Laws ch. 1, § 78; 1827 Ill. Rev. Laws, Criminal Code, div. 5, § 46; An Act Defining Crimes and Punishments §18, 1838–1839 Iowa (Terr.) Acts §18, at 142, 145 (Act of Jan. 5, 1839). (N.B.: Revision of the Connecticut statute in 1830 extended the provision regarding poison to include abortion by instrument as well. 1830 Conn. Acts ch. 1, § 16.); *see also* An Act to Amend "an Act Relative to Crimes & Punishment approved Feb. 10, 1831" § 3, IND. REV. STAT. ch. 26, § 3, at 224, 224 (1838) (Act of Feb. 8, 1835) (amending Indiana criminal code to add a general provision on poisoning that included in one fell swoop a section on using a substance or an instrument with intent to procure miscarriage); 1849–1850 Cal. Sess. Stats. ch. 99, § 45, at 229, 223 (abortion-regulating provision, though it includes using an "instrument" as well as a "medicine" or "substance," given in poisoning section of criminal code); HAW. (KINGDOM) PENAL CODE ch. 12, § 1 (1850) (prohibiting producing miscarriage by "instrument" as well as "poison" or "noxious thing").

303. MOHR, ABORTION IN AMERICA, *supra* note 22, at 37–38.

304. It was declared unlawful to practice "physic [*sic*] and surgery" in New York if "not regularly licensed" in 1796. *In re Smith*, 10 Wend. 449, 453 (N.Y. Sup. Ct. 1833).

the U.S.³⁰⁵ The following year, revisers of the state criminal code, under the advice of “old and experienced surgeons,”³⁰⁶ jumped on the patient-protection bandwagon but took it further. Echoing Hale,³⁰⁷ they distinguished between two kinds of practitioner intent: to “kill”³⁰⁸ (or “destroy”³⁰⁹) an unborn quick child versus to “procure miscarriage.”³¹⁰ This very distinction encodes two different rationales behind interventions that terminate pregnancy that we have seen under the humoral regime, with direct implications for an explicit therapeutic defense.

The most stringent of the three statutory provisions on abortion adopted in New York (in title two, section eight)³¹¹ contemplates abortion by blows. It raised “wilful [*sic*] killing” of an unborn quick child, by any injury to the mother which would be considered murder if it had resulted in the death of the mother,³¹² from misdemeanor to first-degree manslaughter.³¹³ It thus penalized battery in a particular way if against a pregnant woman post-quickening. Means clarifies that this measure excluded practices typical of regulars³¹⁴ and, we can add, of humoral practitioners. Several states adopted a similar measure.³¹⁵ Perhaps

305. ALEXANDER WILDER, HISTORY OF MEDICINE: A BRIEF OUTLINE OF MEDICAL HISTORY AND SECTS OF PHYSICIANS, FROM THE EARLIEST HISTORICAL PERIOD; WITH AN EXTENDED ACCOUNT OF THE NEW SCHOOLS OF THE HEALING ART IN THE NINETEENTH CENTURY, AND ESPECIALLY A HISTORY OF THE AMERICAN ECLECTIC PRACTICE OF MEDICINE, NEVER BEFORE PUBLISHED 440–445 (1901), cited in MOHR, ABORTION IN AMERICA, *supra* note 22, at 38, 272 n.35.

306. MOHR, ABORTION IN AMERICA, *supra* note 22, at 38.

307. HALE, PLEAS OF THE CROWN, *supra* note 60, at 429–34. For the argument that the push for abortion regulation came from doctors, see generally Means, *Cessation of Constitutionality*, *supra* note 19, on New York’s 1828 statute; see also MOHR, ABORTION IN AMERICA, *supra* note 22, at 26–27.

308. An Act Concerning Crimes and Punishments; proceedings in criminal cases; and prison discipline, pt. 4 (Act of Dec. 18, 1828) (codified as 2 N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, art. 1, § 8, at 659, 661 (1828)).

309. pt. 4, ch. 1, tit. 2, art. 1, § 9, at 659, 661 (1828).

310. 2 N.Y. REV. STAT. pt. 4, ch. 1, tit. 6 § 21, at 689, 694 (1828).

311. 2 N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, art. 1, § 8, at 659, 661 (1828).

312. tit. 2, art. 1, § 8.

313. 2 N.Y. REV. STAT. Appendix: Revisers’ Reports and Notes, pt. 4, ch. 1, tit. 2, art. 1, § 8, at 811, 812 (1828–1835) (explaining that the offense theretofore had only been classed a misdemeanor).

314. Means, *Cessation of Constitutionality*, *supra* note 19, at 446 (“No physician in 1828 would have advised blows as an acceptable technique of therapeutic abortion.”).

315. Abortion by blows prohibitions adopted before 1857 (in order of adoption): An Act Concerning Crimes and Punishments, pt. 4, tit. 2, § 8, codified as 2 N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, art. 1, § 8, at 659, 661 (1828) (Act of Dec. 18, 1828); An Act concerning Crimes and their Punishments art. 2, § 9 (codified as MO. REV. STAT. art. 2, § 9, at 168 (1835)) (Act of March 20, 1835); ARK. REV. STAT. ch. 44, div. 3, art. 2, § 5, at 240 (1838); An Act to amend the Acts of this State concerning Crimes and Punishments, and the Penitentiary (An Act, to establish a Penitentiary in the State of Mississippi) ch. 14, § 70, 1839 Miss. Laws app. ch. 14, § 70 at 858, 866 (Act of Feb. 15, 1839) (codified as MISS. STAT. ch. 50, act 1, tit. 3, art. 1, § 8) (1839); An Act Defining Crimes and Punishments ch. 49, § 10, codified as IOWA (TERR.) REV. STAT. ch. 49, § 10, at 162, 167 (1843)) (Act of Feb. 16, 1843); An Act Regulating the Executive Power, the Judiciary, and for Other Purposes art. 3, § 1, 1843–49 Or. (Terr.) Gen. Laws art. 3, § 1 (Act of June 27, 1844) (adopting for Oregon territory the 1843 revised laws of Iowa, incorporating provision targeting abortion by blows); Act of May 18, 1846, tit. 30, § 32, MICH. REV. STAT. tit. 30, ch. 153, § 32 (1846); MINN. (TERR.) REV. STAT. ch. 100, § 10, at 491, 493 (1851); WIS. REV. STAT. pt. 4, tit. 30, ch. 133, § 10, at 682, 683 (1849); An Act concerning crimes and the punishment of offenses against the persons of individuals, ch. 48, § 9, codified as KAN. (TERR.) STAT. ch. 48, § 9 (1855) (Act of July 22, 1855).

reflecting condemnation of the practice itself, or those tempted to use it, this section contained no health exception, implicit or explicit.

Not so for the statute's other abortion provisions. Title two, section nine criminalized intervention with the intent to "destroy" a quick fetus as second-degree manslaughter. Title six, section 21 made willfully employing any means with intent to procure miscarriage a misdemeanor.³¹⁶ Though eliminating the word "quickening" by specifying a "pregnant woman," it imposed on the prosecution the burden of proving pregnancy, which normally entailed proving quickening.³¹⁷

Under either section nine or section twenty-one, an act was not punishable if undertaken to preserve the woman's life or advised as such by two physicians.³¹⁸ Thus, in sections nine and twenty-one, the New York Revisers introduced the first explicit therapeutic exception to an abortion prohibition in Anglophone legislation. They seem to have been aware of its import. They referred to Lord Ellenborough's Act but consciously departed from it; the Notes accompanying section twenty-one state, "The last section is founded upon an English statute . . . but with a qualification which is deemed just and necessary,"³¹⁹ *i.e.*, the therapeutic exception. The idea of a two-physician consultation requirement had already been gathering steam in New York. Regulars had imposed a second-opinion requirement on themselves in their 1823 code of ethics, which required that any physician consult a second regular physician in a difficult case.³²⁰ New York Revisers had considered but ultimately did not enact a proposal that would have made *any surgery* potentially endangering human life, successful or not, a misdemeanor unless necessary to preserve the patient's life or recommended as such by two regular physicians.³²¹ This precautionary principle survived in their regulation of abortion. By 1857, a dozen jurisdictions followed New York in affording an "irregular" who might wish to ensure herself a life-health defense, proof as to medical necessity via consultation with a "regular" physician.³²²

316. 2 N.Y. REV. STAT. pt. 4, ch. 1, tit. 6, § 21, at 689, 694 (1828).

317. tit. 6, § 21.

318. 2 N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, art. 1, § 9, at 659, 661 (1828); 2 N.Y. REV. STAT. pt. 4, ch. 1, tit. 6, § 21, at 689, 694 (1828).

319. 3 N.Y. REV. STAT. Appendix: Revisers' Reports and Notes, pt. 4, ch. 1, tit. 6, § 21, at 811, 829 (1828–1835) (quotation in text above omitting Revisers' reference to Lord Ellenborough's Act), discussed in Means, *Cessation of Constitutionality*, *supra* note 19, at 449.

320. MOHR, ABORTION IN AMERICA, *supra* note 22, at 38, 272 n.36.

321. 3 N.Y. REV. STAT. Appendix: Revisers' Reports and Notes, pt. 4, ch. 1, tit. 6, § 28, at 811, 829 (1828–1835), discussed in Means, *Cessation of Constitutionality*, *supra* note 20, at 451.

322. Seven, including New York, added a two-physician consultation. In order of adoption, they are: An Act Concerning Crimes and Punishments; proceedings in criminal cases; and prison discipline, tit. 2, § 9, tit. 6, § 21 (Act of Dec. 18, 1828) (codified as 2 N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, § 9, tit. 6, § 21 (1828)); An act to provide for the punishment of certain crimes therein named §§ 1, 2, 1833 Ohio Gen. Acts 32nd Sess. at 20, 20-21 (Act of Feb. 27, 1834) (codified as OHIO GEN. STAT. ch. 35, §§ 111, 112 (1841)); An Act to amend the Acts of this State concerning Crimes and Punishments, and the Penitentiary (An Act, to establish a Penitentiary in the State of Mississippi), 1839 Miss. Laws app. ch. 14, § 71 at 858,

C. THE SECOND WAVE: MEDICAL EDUCATION, HEALTH PRACTICE, AND SOCIETAL ANXIETY

1. Formalizing Medical Education

The New York legislation set a pattern privileging “regular physicians”³²³ while they were still a relative rarity in the United States, but this soon changed. In 1800, only four medical schools operated in the United States³²⁴ and “irregulars” vastly outnumbered institutionally trained “regulars.”³²⁵ Mohr argues the regulars used legislation, including abortion regulation, to enhance their competitive status *vis-a-vis* irregulars.³²⁶ Legislation did favor regulars and formal medical education became more widespread. Between 1810 and 1840, twenty-six new medical schools opened; between 1840 and 1876, forty-seven more; and by 1910, 447 medical schools had opened in the previous century in the U.S. and Canada (156 of which survived to 1910).³²⁷ Nearly all excluded women students.³²⁸ A scathing report from the turn of the twentieth century notes

867 (codified as MISS. STAT. ch. 50, act 1, tit. 3, art. 1, § 9, at 693, 695 (1839)); MICH. REV. STAT. ch. 153, §§ 33, 34 (1846) (Act of May 18, 1846); An Act to punish certain crimes therein named, ch. 743, §§ 1, 2, 1848 N.H. Laws Nov. Sess. ch. 743, §§ 1, 2, at 708, 708 (Act of Jan. 4, 1849); WIS. REV. STAT. pt. 4, tit. 30, ch. 133, § 11 (1849); MINN. (TERR.) REV. STAT. ch. 100, § 11, at 493 (1851). *But see infra* Part II.C. (1845 scandals resulted in restricting physician-advice defense). Four other states added a one-physician provision, in order of adoption: An Act concerning crimes and their punishments art. 2, §§ 10, 36 (codified as MO. REV. STAT. art. 2, §§ 10, 36 (1835)) (Act of March 20, 1835) (amending Missouri’s earlier poison-control statute to add, *inter alia*, a physician-consultation defense); ARK. REV. STAT. ch. 44, div. 3, art. 2, § 6 (1837); An Act Regulating Punishments under the Penitentiary System (Penal Code), ch. 6, § 2, 1840 Ala. Acts ch. 6, § 2, at 143 (“respectable [*sic*] physician”); An Act concerning crimes and the punishment of offenses against the persons of individuals, ch. 48, §§ 10, 39 (codified as KAN. (TERR.) STAT., ch. 48, §§ 10, 39 (1855)) (Act of July 22, 1855). One, California, provided that only a physician could enjoy the life-saving presumption. 1849–1850 Cal. Sess. Stats. ch. 99, § 45, at 223 (presumption of legality only available to physician, not others, acting to save life of woman). Hawaii’s ambiguously specified a “surgeon or other” eligible. HAW. (KINGDOM) PENAL CODE § 2 (1850) (exception for surgeon “or other” saving life of the mother).

323. *See supra* Part II.B.2.b; *see also* LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD, *supra* note 22, at 15–16 (describing the rise to prominence of elite “regular” physicians).

324. They are: the medical departments of King’s College in New York (begun 1708, this medical department does not benefit the nineteenth century long, as the college collapses during the British occupation during the War of 1812); the College of Philadelphia (later, University of Pennsylvania) (1765); Harvard College (1783); and Dartmouth College (1798). Another, that of Yale College, was added at the end of the first decade of the century (1810). *See* Abraham Flexner, *Medical Education in America: Rethinking the Training of American Doctors*, THE ATLANTIC (June 1910), <http://www.theatlantic.com/magazine/archive/1910/06/medical-education-in-america/306088/> [hereinafter Flexner, *Medical Education in America*].

325. *See, e.g.*, MOHR, ABORTION IN AMERICA, *supra* note 22, at 32 (in 1800 two-thirds of those making a living as physicians in Philadelphia were neither members of the College of Medicine nor graduates of any medical school). The very designation “regulars” and “irregulars” points to normalizing and stigmatizing processes at work.

326. *See generally id.*

327. *See* Flexner, *Medical Education in America*, *supra* note 324.

328. In 1849, Elizabeth Blackwell became the first openly female graduate of a U.S. medical school (Geneva College in New York). JACALYN DUFFIN, HISTORY OF MEDICINE: A SCANDALOUSLY SHORT INTRODUCTION 301 (2010) [hereinafter DUFFIN, HISTORY OF MEDICINE]. Two sex-segregated medical

that medical institutes, primarily commercial in nature, had supplanted prior modes of apprenticeship training with lecture-hall education.³²⁹

The rise of formal medical education contributed to radical change in health care.³³⁰ Care providers now included a new figure, the formally-educated but practically-inexperienced solo practitioner. In early decades of the century, the new men struggled to compete with highly valued local healers and midwives,³³¹ but they gained ground at women's expense, with legislative restrictions playing a significant role in determining who could practice.³³² One of the results was a basic regendering of medical care.³³³

In addition to these demographic shifts, I argue that medical schools had a profound impact on pedagogy that became significant for abortion and its regulation. Formal medical schools promulgated different kinds of knowledge, teaching about anatomy—organs and “systems”—and expounding theories that located disease in specific sites on the body. They also taught these new subjects in a different way. A few medical institutes were attached to a teaching hospital, but in most, anatomical lectures depended on description in words, illustrative charts, or, when available, cadavers.³³⁴ The lecture-hall pedagogy replacing the older mode of training by apprenticeship³³⁵ isolated and objectified both disease

schools for women opened in Philadelphia (1850) and New York (1863). *Id.* at 303. When Johns Hopkins University founded its medical department in 1893, a stipulation of donor Mary Garrett obliged it to offer 10% of its seats to women students. *Id.*

329. Flexner, *Medical Education in America*, *supra* note 324.

330. Siegel, *Reasoning from the Body*, *supra* note 279, at 319–20; *see also* Cohen, *A Jurisprudence of Doubt*, *supra* note 13, at 204–15 (placing the regulation of abortion in the U.S. in longer historical context and characterizing the nineteenth-century campaign by regular physicians to legislate abortion prohibition as patriarchy's resurgent self-defense).

331. *See generally* MOHR, *ABORTION IN AMERICA*, *supra* note 22.

332. For a comparison of midwives' higher rates of success than physicians' in regard to maternal and infant mortality, *see generally* Ulrich, *Midwifery and Mortality*, *supra* note 245, at 29; *see also, e.g.*, Edward Atwater, *The Medical Profession of a New Society, Rochester, New York, (1811-1860)*, *BULL. HIST. MED.* XLVII, No. 3 221–35 (May–June 1973), *cited in* MOHR, *ABORTION IN AMERICA*, *supra* note 22, at 34, n.26, 271–72.

333. *See* MOHR, *ABORTION IN AMERICA*, *supra* note 22; Siegel, *Reasoning from the Body*, *supra* note 279; LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD*, *supra* note 22; CARROLL SMITH-ROSENBERG, *DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA* 217–44 (1985); PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* (1982); RICHARD SHYROCK, *THE DEVELOPMENT OF MODERN MEDICINE: AN INTERPRETATION OF THE SOCIAL AND SCIENTIFIC FACTORS INVOLVED* (1947).

334. Demand for specimens exceeds supply and in some states, statutes prohibiting exhumation of cadavers began to appear during this period. *See, e.g.*, CONN. STAT. LAWS tit. 22, § 72 (1821) (criminalizing removing a body from a grave “for the purposes of dissection, or any surgical, or anatomical, experiments”); *see also, e.g.*, An Act Relative to Crimes and Punishments, ch. 26 (codified as IND. REV. STAT. ch. 26, § 36 207, 213 (1838)) (Act of Feb. 10, 1831); An Act defining Crimes and Punishments, § 88, 1838-1839 Iowa (Terr.) Acts § 88 142, 165–66 (Act of Jan. 5, 1839); An Act Concerning Crimes and Punishments, ch. 1 (codified as 1 MO. REV. LAWS ch. 1, § 78, 281, 306–07 (1825)) (Act of Feb. 12, 1825); An Act Concerning Crimes and Punishments § 94, 1844 R.I. Pub. Laws Jan. Sess. § 94.

335. The exception is the first U.S. medical school in Philadelphia, which in its early decades required students have a year of apprenticeship with a practitioner before matriculating and had integrated bedside hospital rounds with classroom education. *See* Flexner, *Medical Education in America*, *supra* note 324.

and patient. Instead of demonstrating techniques with an ill person in her home as earlier practitioners had, it relied on teaching aids like anatomical diagrams that abstract the imagined “patient” from social context;³³⁶ instead of working with live patients, it used drawings, or cadavers that did not cry out, talk back, or protest when cut upon. Medical school pedagogy oriented students to a target set of symptoms rather than to the holistic humoral balance of a person in distress and introduced students to a range of new or formerly rare intrusive procedures.³³⁷

By mid-century different approaches to medicine proliferated. While some with formal medical education criticized the therapeutic practices of humoral health as too interventionist,³³⁸ other “regulars” responded to the new styles of training by becoming even more prone to intervene, in more intrusive ways. In this, I propose, lecture-based pedagogy that flattens and depersonalizes may have contributed to a widely observed social phenomenon, namely that formally trained physicians were increasingly prone to try previously rare surgical interventions.³³⁹

The introduction of new conceptions of health that existed in parallel with humoral theories, accelerated by the changes in knowledge transmission, brought radically different techniques to gynecological practice. The intrusive measures that regular physicians attempted more frequently in gynecology include dilating the cervix, rupturing the amniotic sac to induce contractions, pulverizing the fetus *in utero* and then extracting it, or, most dangerously, attempting Caesarian section to save a pregnant woman’s life.³⁴⁰

336. Practitioners of humoral health cultivated knowledge of their patients’ social context. “A physician who knew a family’s constitutional idiosyncracies was necessarily a better practitioner than one who enjoyed no such insight—or even one who hailed from a different climate, for it was assumed that both the action of drugs and the reaction of patients varied with season and geography.” Rosenberg, *Therapeutic Revolution*, *supra* note 222, at 44.

337. Martin S. Pernick spots similar shifts. Although he inverts the historical sequence between belief and practice that I propose, he nonetheless reports changes that support my overarching contention: “The relatively high level of surgical specialization reflected another important difference between nineteenth-century medicine and surgery—the surgeon’s necessarily more specific and localized conceptions of disease. While nineteenth-century physicians favored general remedies . . . operative surgery assumed that correcting local lesions in specific organs could cure specific diseases.” MARTIN S. PERNICK, *A CALCULUS OF SUFFERING: PAIN, PROFESSIONALISM, AND ANESTHESIA IN NINETEENTH CENTURY AMERICA* 29 (1985) [hereinafter PERNICK, *CALCULUS OF SUFFERING*].

338. Rosenberg, *Therapeutic Revolution*, *supra* note 222, at 46 (describing a school of thought known as the “therapeutic nihilists” to its detractors).

339. The first technical book on surgery published in the United States, published in 1813, marked the new movement in medicine. JOHN SYNG DORSEY, *ELEMENTS OF SURGERY* (1813). On Dorsey, surgery, and surgical texts in the United States, see Susan Garfinkel, ‘This Trial was Sent in Love and Mercy for My Refinement’: A Quaker Woman’s Experience of Breast Cancer Surgery in 1814, in Leavitt, WOMEN AND HEALTH, *supra* note 236, at 68, 74 [hereinafter Garfinkel, *Quaker Woman’s Breast Cancer Surgery*] (describing the work of Dorsey, a University of Pennsylvania medical school graduate-turned-professor). See generally DUFFIN, *HISTORY OF MEDICINE*, *supra* note 328, at 245–75 (ch. 10, “Work of the Hand: History of Surgery”).

340. MOHR, *ABORTION IN AMERICA*, *supra* note 22, at 14.

As early as 1828, revisers of the New York criminal code reported their skepticism towards a new willingness to perform surgery and acknowledged it inspired increased regulation of medical practice itself:

The rashness of many young practitioners in performing the most important surgical operations for the mere purpose of distinguishing themselves, has been a subject of much complaint, and we are advised by old and experienced surgeons, that the loss of life occasioned by such practice, is alarming.³⁴¹

Concern over “rashness” became a recurrent theme of this time.³⁴² Public alarm at “rashness” informed a wider backlash³⁴³ and even arrested new measures that might be seen as ameliorative in patient care, for example, extending the use of anesthesia.³⁴⁴ As “brash young men” took up obstetrics and edged out midwives,³⁴⁵ later historians have found, childbirth became more dangerous over the course of the nineteenth century.³⁴⁶

Consumer protection and malpractice regulation, the concern reflected in first-wave statutes, was but one response to changes in the health regime. Other symptoms of anxiety arose. The 1840s storm over “abortion” described in the next Section focused on practitioners at the margins of respectability. However, though targeting “abortionists,” it did not target abortion in general, nor potional abortion, nor even abortion by blows. It focused on intrusive abortion. In this respect,

341. 3 N.Y. REV. STAT. Appendix: Revisers’ Reports and Notes, pt. 4, ch. 1, tit. 6, § 28, 811, 829–30 (1828–1835), *discussed in Means, Cessation of Constitutionality*, *supra* note 19, at 451. Contrast this eagerness with the reluctant trepidation of surgeons called to remove a nearly one-pound breast tumor in 1814: “I was willing the business should proceed,” writes the patient, “but the young men hesitating to perform it, it was judged best to delay the matter” until an older, more experienced doctor could perform it. Garfinkel, *Quaker Woman’s Breast Cancer Surgery*, *supra* note 339, at 68, 72.

342. *See, e.g.,* Rice v. State, 8 Mo. 403, 405 (1844) (“If a person assume to act as a physician, however ignorant of medical science, and prescribe with an honest intention of curing the patient, but . . . the patient die in consequence of the treatment, contrary to the expectation of the person prescribing, he is not guilty of murder or manslaughter. But if the party prescribing have so much knowledge of the fatal tendency of the prescription, that it may reasonably be presumed that he administered the medicine from an obstinate, willful rashness” he is guilty of manslaughter at least, even if he did not intend any bodily harm to the patient) (also *cited in* MO. REV. STAT. art. 2, ch. 47, § 22, n. c, 348 (1844–45) (case in footnote to manslaughter provision of state criminal statute, which read together implies this jurisdiction continuing the doctrine of excluding a medical practitioner acting with curative intent from criminal culpability but changing it to make culpable a practitioner acting out of “obstinate, willful rashness”)).

343. *See* Rosenberg, *Therapeutic Revolution*, *supra* note 222, at 49 (describing the “therapeutic nihilism” movement of the second third of the century).

344. In 1842, Georgia surgeon Crawford Long, who had attended “ether parties” as a medical student in Philadelphia, experimented with using ether with surgical patients in eight minor operations but negative public outcry induced him to stop. DUFFIN, *HISTORY OF MEDICINE*, *supra* note 328, at 261; *See also* PERNICK, *CALCULUS OF SUFFERING*, *supra* note 337, at 35 (arguing in mid-nineteenth century America, “humane, conscientious, highly reputable practitioners and ordinary lay people” held what they believed to be rationally-based misgivings about surgical anesthesia).

345. Ulrich, *Midwifery and Mortality*, *supra* note 245, at 61.

346. *Id.* at 59.

debate implicated not only *practitioners* at the margins of respectability—a certain group of commercially organized, and apparently more urban-based, irregulars—but *practices* at the margins of respectability, namely intrusive measures. Although public criticism centered on a handful of irregular practitioners, what aroused public concern was the general category of risky practices adopted with less caution by regulars in all branches of medicine, *i.e.*, intrusive measures and surgeries. Abortion thus became a locus for societal debate over broader changes in health theories and treatment. The following Section describes some of the mechanisms of this debate and their particular impact on abortion and the health exception.

2. The Penny Press: Sensation, Surgery, and Stigma

In the mid-1800s, the “penny press,” cheap, widely distributed urban newsheets, boomed in popularity. Their revenue stream depended on advertising and on mass sales; for the latter, the genre of the sensational story evolved to arouse a mixture of titillation and condemnation, voyeurism, and outrage. Historian Clifford Browder suggests “abortion” came to feed both.³⁴⁷ To understand the second wave of U.S. abortion statutes, it is useful to know something about the scandal that inspired them.

In New York in March 1839 an irregular practitioner, “Madame Restell” (the alias of English immigrant Ann Lohman), came to public attention.³⁴⁸ She advertised “simple, easy, healthy, and certain remedy” for parents whose families had “increased” despite their wishes or means to support new offspring.³⁴⁹ If the pills she advertised³⁵⁰ failed, she offered a short operation (usually inserting a sharp instrument intravaginally to pierce the amniotic sac and thus stimulate contraction and miscarriage) and boardinghouse room for patient post-operative recuperation.³⁵¹

347. See generally CLIFFORD BROWDER, *THE WICKEDEST WOMAN IN NEW YORK: MADAME RESTELL, THE ABORTIONIST* (1988) [hereinafter BROWDER, *ABORTIONIST*].

348. For contemporary recital of the facts of Madame Restell’s case once she was brought to trial, see, e.g., *Trial of the Notorious Madame Restell alias Ann Lohman for Abortion and Causing the Death of Mrs. Purdy; Being a Full account of all the Proceedings on the Trial, Together with the Suppressed Evidence and Editorial Remarks* (1841), <http://resource.nlm.nih.gov/101521473>, also available at GALE CENGAGE LEARNING, *The Making of Modern Law Trials, 1600-1926* online database.

349. Advertisement, N.Y. SUN, Mar. 27, 1839 (with an indication that the ad began Mar. 18, 1839), reprinted in BROWDER, *ABORTIONIST*, *supra* note 347, at 9. Cf. ROBERT DALE OWEN, *MORAL PHYSIOLOGY; OR, A BRIEF AND PLAIN TREATISE ON THE POPULATION QUESTION* 32–33 (8th ed. 1835 (1831)) (presenting arguments in favor of birth control and regulating population growth), quoted in Advertisement, *id.* Browder recognizes that “Restell’s” advertisement borrowed text from Owen’s work, BROWDER, *supra*, at 10.

350. Advertisement, N.Y. SUN, May 9, 1839, reprinted in BROWDER, *ABORTIONIST*, *supra* note 347, at 11.

351. BROWDER, *ABORTIONIST*, *supra* note 347, at 16–17. Lohman was not alone. Less famous irregulars advertised similar services. For description of the business of urban abortion and affiliated boarding house services, see e.g., *id.* at 12, 14–15.

Competing newspapers condemned the propriety of advertising services like Restell's on the grounds that they inevitably endangered patients' lives.³⁵² Citing the danger to patients, editorials warned Madame Restell to "beware ere it is too late"³⁵³ and called upon the public to denounce her.³⁵⁴ Such writing led to mob marches on clinics and calls for police action³⁵⁵ under first-wave statutes theretofore not vigorously enforced.³⁵⁶ All of this activity created a public aware of intrusive abortion and a following for scandalous trials when operative mishap or post-operative infection claimed a patient.

A similar pattern—advertisement and sensational story, patient death, outrage—repeated in Boston and elsewhere in roughly the same period.³⁵⁷ I suggest that in creating the infamous public figure of "the abortionist," over the course of the 1840s, the popular press increasingly associated intrusive measures with "abortion" in the public mind and stimulated outrage as the public affect towards them. A certain form of publicity, salacious news, gave rise to a public morality and created publics demanding satisfaction for outrages on that morality. Neither common law doctrine nor statutory provisions (in states that had passed them) provided a fail-proof basis for prosecuting practitioners for the deaths of women from sepsis or shock following intrusive abortions.

352. See, e.g., Samuel Jenks Smith, N.Y. SUNDAY MORNING NEWS, July 7, 1839 (condemning the *New York Sun* for running Restell's ads, writing that physicians opposed her because her practices endangered patients' lives), discussed in BROWDER, ABORTIONIST, *supra* note 347, at 17-18.

353. *Id.* Smith, the *New York Sunday Morning News* editor, also denounced Restell's advertisement as "monstrous and destructive" for publicizing a practice that "strikes at the root of all social order," objecting to the danger to patients and to fidelity and married life (but, not, notably, to fetal existence). Smith, *supra*, quoted in BROWDER at 17-18.

354. Samuel Jenks Smith, N.Y. SUNDAY MORNING NEWS, July 14, 1839, cited in BROWDER, ABORTIONIST, *supra* note 347, at 18 ("If laws cannot reach her, the voice of the people will; yes it will call upon her in tones of thunder to abandon the nefarious trade in which she is engaged, and which she dares to say has never resulted in a single failure.").

355. Report of Restell's arrest on August 17, 1839 for misdemeanor abortion ran in the *Morning Courier and New-York Enquirer*. MORNING COURIER, Aug. 19, 1839 and NEW-YORK ENQUIRER Aug. 21, 1839, discussed in BROWDER, ABORTIONIST, *supra* note 347, at 19-20. But see Madame Restell, open letter to Smith, N.Y. HERALD, July 15, 1839, at 3 (rejoinder from Restell to Smith's July 1839 editorials); BROWDER, ABORTIONIST, *supra* note 347, at 18 (explaining that The Herald's publication of Restell's open letter to Smith reflected support for Restell by Smith's rival, Herald editor James Gordon Bennett); see also *Madame Restell Under Arrest—Seduction in High Life*, N. Y. DAILY TIMES, Feb. 13, 1854, at 8 (report of Restell's 1854 arrest for abortion of a consenting woman, by then made a felony); *Madame Restell Arrested on Felony Charges of Criminal Abortion*, N. Y. DAILY TIMES, Feb. 14, 1854, reprinted in ROSE, ABORTION DOCUMENTARY GUIDE, *supra* note 25, at 17-19. My argument here is about the socially formative power of discourse. The editorials, denunciations, and responses around cases like Restell's sold newspapers; spoke into being emergent moralities and norms; and created reading publics following scandal and salacious story focused around changing conceptions of health and attendant practices.

356. New York's 1828 and 1830 provisions until this time largely "lay buried in the code, unenforced." Quay, *Justifiable Abortion*, *supra* note 223, at 500; see also Means, *supra* note 19, at 460-463.

357. See HULL & HOFFER, ABORTION RIGHTS IN AMERICAN HISTORY, *supra* note 298, at 32-33.

When Massachusetts courts dismissed two 1845 patient-death cases,³⁵⁸ outrage at the failed prosecutions inspired a second wave of abortion legislation. Massachusetts adopted its first state law regulating abortion,³⁵⁹ even making attempt—acting with intent to cause abortion at any time in pregnancy—a misdemeanor, and, if a patient died as a consequence, a felony. It preserved the implicit life-health exception by requiring that the act be done “maliciously or without lawful justification.”³⁶⁰ Likewise, in New York, after one infamous Restell incident, the legislature revised its abortion statute, restricting the prior life-health exception only to an act undertaken with “intent to destroy a child,”³⁶¹ eliminating the exception in the case of an act with “intent to procure miscarriage,”³⁶² and doing away with the protection provided by acting on the advice of two physicians.³⁶³ The New York revision broke new ground in the United States by penalizing a woman herself for soliciting abortion.³⁶⁴

The sensationalized cases and legislative responses they generated in the Northeast ignited legislation in other states. Between 1845 and 1857, some jurisdictions, like New York, although keeping their pre-existing exception for an act necessary to preserve a woman’s life, revised statutes to make them more stringent.³⁶⁵ A number of jurisdictions that had not previously regulated abortion

358. *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263, 265–66 (1845) (dismissing charges against practitioner Luceba Parker in patient death allegedly from abortion, on the grounds that the prosecution failed to provide evidence of quickening, without which it failed to prove pregnancy and thus failed to prove intent to commit abortion); *see also* HULL & HOFFER, *ABORTION RIGHTS IN AMERICAN HISTORY*, *supra* note 298, at 32 (describing case dismissing charges in the death of patient Maria Aldrich after abortion attempted at a stage of advanced pregnancy); MOHR, *ABORTION IN AMERICA*, *supra* note 22, at 120–21 (linking the failed prosecutions of Parker and of Aldrich’s care provider to movements for stricter statutory regulation of abortion).

359. *An Act to Punish Unlawful Attempts to Cause Abortion*, ch. 27, 1845 Mass. Gen. Laws ch. 27, at 322 (*Act of Jan. 31, 1845*) (published as MASS. REV. STAT. SUPP. (1836-1849)).

360. *Id.*

361. *An Act to Punish procurement of Abortion, and for other purposes*, ch. 260, 1845 N.Y. Laws 68th Sess. ch. 260, § 1, at 285, 285 (*Act of May 13, 1845*) (excepting from liability action “necessary to preserve the life of the mother”). In 1846, the legislature amended the section punishing an act intended to “destroy a child,” to require actual death of a woman or child to support a manslaughter prosecution against a practitioner, in effect getting rid of the short-lived 1845 provision that would have criminalized “attempt.” *Act of March 4, 1846*, ch. 22, § 1, 1846 N.Y. Laws 69th Sess. 19 (amending the section of the 1845 statute concerning an act intended to “destroy” a child, to permit an act necessary to “preserve” the woman’s life and to require the death of woman or child to support a manslaughter charge).

362. § 2, at 286.

363. § 1, at 285.

364. *An Act to Punish procurement of Abortion, and for other purposes*, ch. 260, 1845 N.Y. Laws 68th Sess. ch. 260, §§ 3, 5, at 285, 286 (*Act of May 13, 1845*) (providing three months to one year in jail for a woman soliciting abortion and, for repeat offenders, two to five years in prison).

365. *See, e.g.*, 1845 N.Y. Laws 68th Sess. ch. 260, §§ 1, 2, 3, 5, at 285, 285–6 (amending existing New York Law to eliminate prior life-health exception for an act intended to procure miscarriage, to remove physician-consultation provision, and to make a patient herself criminally liable for seeking abortion); *Act of June 14, 1852*, ch. 6, codified as 2 IND. REV. STAT. ch. 6, § 36, at 424, 437 (1852) (amending existing 1835 Indiana law, IND. REV. STAT. ch. 26, § 3 (1838), to include not only an act intended to procure miscarriage in a pregnant woman but also in “any woman he supposes to be pregnant”); *Act of Apr. 17, 1857*, ch. 124, ME. REV. STAT. ANN. tit. 11, ch. 124, § 8, at 664, 685 (1857) (amending existing

through legislation added new statutory restrictions, some with an explicit therapeutic exception³⁶⁶ and others with an implicit therapeutic intent exception encoded in intent provisions.³⁶⁷ Some courts also took a harder line³⁶⁸ and in particular cases that extended to their treatment of therapeutic intent.³⁶⁹

D. DOCTRINE: RAPID CHANGE AND FRACTURED UNIFORMITY

Over the short nineteenth century, new developments in the production and circulation of discourse—from high-culture developments like the production of biological science and the ascendance of formal medical education,³⁷⁰ to the low-brow, like the rise of sensational news³⁷¹—effected cultural and social formations around abortion with consequences for legal doctrine. Knowledge derived from empiricism promoted localized theories of health and disease.³⁷² The new science of embryology used organ development, rather than humors and

Maine law, ME. REV. STAT. tit. 12, ch. 160, § 14 (1841) to raise punishment for procuring miscarriage from one year imprisonment or \$1000 fine, to the imprisonment and the fine).

366. New provisions, with an explicit therapeutic exception, passed between 1845 and 1857 in already-existing jurisdictions are (in order of adoption): MICH. REV. STAT. ch. 153, §§ 32, 33, 34 (1846); 1848 N.H. Laws 708; 1848 Va. Acts tit. 2, ch. 3, § 9, at 96; WIS. REV. STAT. ch. 133, § 11 (1849) (permitting an act necessary to preserve woman's life). Some new jurisdictions also passed statutes with an explicit life-health exception, including: 1853–1854 Or. Laws 187; An Act Relative to Crimes and Punishments, and Procedures in Criminal Cases, 1854 Wash. (Terr.) Laws 1st Sess. ch. 2, §§ 37, 38, at 75, 81; 1855 Kan. Sess. Laws 238, 243–44 (permitting an act to “preserve” woman's life); *see also* 1849–1850 Cal. Stat. 233; 1850 Haw. Sess. Laws 22 (permitting an act to “save” woman's life) (N.B. Hawaii was not a U.S. territory at the time, but some of its statutes reflect contemporaneous cultural and social uses of law on the mainland. *See* SALLY ENGLE MERRY, *COLONIZING HAWAII: THE CULTURAL POWER OF LAW* (2000) [hereinafter MERRY, *COLONIZING HAWAII*].)

367. New statutes passed between 1845 and 1857 with an implicit therapeutic exception are: An Act to Punish Unlawful Attempts to Cause Abortion, ch. 27, 1845 Mass. Gen. Laws ch. 27, at 322 (Act of Jan. 31, 1845) (published as MASS. REV. STAT. Supp. (1836–1849)) (requiring an act intending to cause miscarriage of a pregnant woman be done “maliciously or without lawful justification” to be punishable (as felony, if the woman perished, and as misdemeanor, if she did not)); 1846 Vt. Acts & Resolves No. 33, 34–35 (codified as VT. COMP. STAT. tit. 28, ch. 108, § 8 (1851)) (requiring a substance be administered “maliciously, or without lawful justification,” or an instrument be employed “maliciously and without lawful justification,” to be punishable); 1849 N.J. Laws 266–267 (requiring an act be done “unlawfully” or “willfully” to be punishable); *see also* An Act Relative to Crimes and Offenses, Act of March 14, 1855, 1855 La. Acts No. 120, 129, 132–33 (codified as LA. REV. STAT., CRIMES & OFFENSES § 24, 134, 138 (1856) (no explicit life-health exception, but implicit exception in requirement that a drug or potion be “feloniously administered”).

368. *See, e.g.,* Mills v. Commonwealth, 13 Pa. 631, 633 (1850) (by abandoning quickening distinction, expanding act punishable as “abortion” to any time during pregnancy); State v. Murphy, 27 N.J.L. 112, 114, 116 (Sup. Ct. 1858) (adding attempt offenses). Even *Murphy* specifies an act must have been done “without lawful justification,” excluding acts done with therapeutic intent. *See* 27 N.J.L. at 113.

369. *See, e.g.,* Smith v. State, 33 Me. 48, 54–55 (1851) (citing Commonwealth v. Parker, 50 Mass. (9 Metc.) 263 for the proposition that if medicine is given to procure abortion and the woman dies, the act was done “without lawful purpose and dangerous to life,” and thus malice is imputed).

370. *See supra* Part II.B. and Part II.C.1.

371. *See supra* Part II.C.2.

372. *See supra* Part II.B.1.

elements, to mark stages in human fetal development.³⁷³ A conceptualization of bodily systems—the circulatory system, the reproductive system—divided the body rather than conceiving it holistically.³⁷⁴ The social organization of medicine also began to shift radically, regendering care, engaging different techniques and ethics,³⁷⁵ and operationalizing new bodies of knowledge.³⁷⁶ Formalization of medical training propelled these changes and imparted a greater degree of standardization in practice,³⁷⁷ a different sense of boundaries around what good practice or malpractice entails, and emergent structures for policing the boundaries.³⁷⁸

This concentrated change in medicine unsettled the law. Abortion regulation was initially introduced in state code revisions that, Siegel points out, were the product of experts, not legislative or public debate.³⁷⁹ As anxieties over sociological and epistemic changes in medicine surfaced more broadly and abortion became a locus of debate over patient care, institutions of populism and popular sovereignty—the penny press, elected representatives—got involved.³⁸⁰ The tempo of change increased. At the start of the short nineteenth century, no state regulated abortion by statute; by 1857, nearly two-thirds do.³⁸¹ Legislatures became locomotives of change, dissolving common-law uniformity across jurisdictions. Every state had its own law.³⁸²

373. On the history of embryology, see generally JOSEPH NEEDHAM, *A HISTORY OF EMBRYOLOGY* (1934).

374. See *supra* Part II.C.1.

375. See Siegel, *Reasoning from the Body*, *supra* note 279.

376. See also *infra* Part III.C. (further describing such changes).

377. Regarding “one-size-fits-all” claims of the new laboratory-based medical sciences and skepticism towards them—even among regulars—see generally Rosenberg, *Therapeutic Revolution*, *supra* note 222.

378. *Id.*

379. Siegel, *Reasoning from the Body*, *supra* note 279, at 282 n. 74.

380. See *supra* Part II.C.2.

381. Twenty of thirty-one states and four of seven territories regulated abortion by statute by 1857. For a compendium of statutes including those in force at the time, see Quay, *Justifiable Abortion*, *supra* note 223, at 447–520. Hawaii also enacted an abortion regulation in 1850, although it did not become a U.S. territory until 1900. HAW. PEN. CODE, ch. 12, §§ 1, 2 (1850). (For the role of law in negotiating a relationship for pre-statehood Hawaii with an expansive United States, see generally MERRY, *COLONIZING HAWAII*, *supra* note 366.)

382. Until a jurisdiction makes abortion the subject of statute, common-law presumptions of legality continue. See generally *supra* Part I.D.; see also, e.g., *Boies v. McAllister*, 3 Me. 308, 308 (1835) (finding evidentiary rule admitting rumor of plaintiff as criminal suspect not applicable to testimony regarding woman’s rumored measures to procure abortion, implying court does not consider abortion a crime in Maine, five years before passage of statute). In those jurisdictions with an abortion statute, interpretation of therapeutic intent doctrine is increasingly informed by conceptions of risk and malpractice. See, e.g., *Commonwealth ex rel. Chauncey & Nixon v. Keeper of the Prison*, 2 Ashmead 1st Jud. D. Pa. 227, 231 (1841) (Philadelphia County, 1838), (finding that responsibility for death of abortion patient lies with the men who administered the abortifacient, even where they did not intend to kill patient, but they were “deliberate and malicious” and their acts were “attended with great danger.”).

Thus, by 1857, the life-health defense, too, had become a local creature. New statutory provisions and emerging nuances in therapeutic doctrine present some puzzles that knowledge of humoral health helps us to understand. First, practices disfavored under humoral health, having no humoral benefit and posing patient risk,³⁸³ were singled out for blanket statutory prohibition. That explains the somewhat puzzling provision making punishable “the wilful killing of any unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother.”³⁸⁴ All states enacting such a provision permitted abortion under other circumstances.³⁸⁵ Bearing in mind contemporaneous abortion practice, these provisions can be understood as targeting abortion by blows. They make sense in the same way that provisions prohibiting using “poison”³⁸⁶ to induce miscarriage (the terminology distinguishing this from routine potional abortion)³⁸⁷ do. Neither of these practices is supported by humoral health rationale³⁸⁸ and neither such provision, in any jurisdiction that adopts them, makes exception for therapeutic intent.

Second, common-law doctrine reflecting the nuances of humoral care is perpetuated in certain otherwise puzzling legal formulations in the new statutes. Under humoral theory, threat to a woman’s life from gynecological disorder goes beyond the emergency states of abnormal pregnancy or life-threatening complications in labor³⁸⁹ and humoral health developed many compounds to restore balance by inducing menstruation (many of which were also acknowledged to terminate pregnancy).³⁹⁰ Uterine purgatives in either case—pregnancy emergency or humoral imbalance—preserved a patient’s life. In ascertaining liability for unintended patient death resulting from these practices, the common law exercised flexibility by relying on categories of intent rather than categories of controlled substances, exemplified in Hale’s differential treatment of practitioner liability from a potion given to “cure or prevent a disease”³⁹¹ versus from a potion given to a woman not “to cure her of a disease” but “to destroy the child

383. See *supra* Part I.C. (reviewing three categories of causing abortion and their status under humoral health).

384. For pre-1857 state laws prohibiting abortion by blows, see *supra* note 315; see also *supra* text accompanying notes 311–315. The language in these provisions, nearly identical, typically reads in full, “The wilful killing of any unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree.” MO. REV. STAT. § 9 at 168 (1835).

385. Cf. *supra* note 315 (reporting statutes criminalizing abortion by blows) and *infra* note 397 (reporting statutes permitting abortion by other means for curative purposes).

386. For pre-1857 state laws prohibiting abortion by “poison” specifically, see *supra* note 302. Indiana statute singled out “poison” in § 1 but adds “medicines” and “instruments” in § 3. IND. REV. STAT. ch. 26, §§ 1, 3, at 224, 224 (1838) (Act of Feb. 7, 1835).

387. See *supra* Part II.B.2.a.

388. See *supra* Part II.B.2.a.

389. See *supra* Part I.A.

390. See *supra* Part I.C.

391. See HALE, PLEAS OF THE CROWN, *supra* note 60, discussed *supra* in text accompanying note 191.

within her.”³⁹²

This background clarifies some potentially puzzling new statutes and formulations. New statutes differentiated an act “to destroy a child”³⁹³ from one “to procure miscarriage,”³⁹⁴ penalizing the former more heavily.³⁹⁵ Unlike the abortion by blows or poisoning provisions, jurisdictions provided explicit

392. *See id.*, discussed in text accompanying *supra* note 192.

393. Pre-1857 statutes requiring, to be punishable, an act be undertaken with intent “to destroy child” (in order of adoption): 1830 Conn. Laws ch. 1, § 16, at 255; An Act concerning crimes and their punishments art. 2, (codified as MO. REV. STAT. art. 2, § 10, at 168, 169 (1835)) (Act of March 20, 1835); An Act Concerning Crimes and Punishments pt. 4, codified as 2 N.Y. REV. STAT. pt. 4, ch. 1, tit. 2 § 9, at 659, 661 (Act of Dec. 18, 1828); An act to provide for the punishment of certain crimes therein named § 2, 1833 Ohio Gen. Acts 32nd Sess. § 2, at 20, 21 (Act of Feb. 27, 1834) (codified as OHIO GEN. STAT. ch. 35, § 112 (1841)); ARK. REV. STAT. ch. 44, div. 3, art. 2, § 6, at 240 (1838); An Act Defining Crimes and Punishments, codified as IOWA (TERR.) REV. STAT. ch. 49, § 10, at 162, 167 (1843) (Act of Feb. 16, 1843) (amending criminal statute to add “destroy child” provision) (repealed in IOWA CODE tit. 1, ch. 4, § 28, leaving no statutory regulation of abortion in Iowa 1851–1858); An Act to amend the Acts of this State concerning Crimes and Punishments, and the Penitentiary (An Act, to establish a Penitentiary in the State of Mississippi), 1839 Miss. Laws app. ch. 14, § 71, at 858, 867 (Act of Feb. 15, 1839) (codified as MISS. STAT. ch. 50, act 1, tit. 3, art. 1, § 9, at 693, 695 (1839)); Act of Oct. 22, 1840, ch. 160, ME. REV. STAT. tit. 12, ch. 160, § 13, at 684, 686 (1841) (retained, though succinctly combined in same section with “procure miscarriage” provision, *in* ME. REV. STAT. tit. 11, ch. 124, § 9 (1857)); An Act Regulating the Executive Power, the Judiciary, and for Other Purposes Art. 3, § 1, 1843–49 Or. (Terr.) Gen. Laws art. 3, § 1 (Act of June 27, 1844) (importing, wholesale, the 1843 laws of Iowa, including the “destroy child” provision encoded in IOWA (TERR.) REV. STAT. ch. 49, § 10 (1843)); 1845 N.Y. Laws 68th Sess. ch. 260, § 1, at 285, 285–86 (codified as 2 N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, art. 1, § 9 (1828–1845)); Revised Statutes of the State of Michigan, tit. 30, ch. 153, MICH. REV. STAT. tit. 30, ch. 153, § 33, at 657, 662 (1846) (Act of May 18, 1846); An Act to punish certain crimes therein named, ch. 743, 1848 N.H. Laws Nov. Sess. ch. 743, § 2, at 708, 709 (Act of Jan. 4, 1849); WIS. REV. STAT. pt. 4, tit. 30, ch. 133, § 11, at 682, 683 (1849); Revised Statutes of the Territory of Minnesota, MINN. (TERR.) REV. STAT. ch. 100, § 11, at 491, 493 (1851); An Act Relative to Crimes and Punishments, and Procedures in Criminal Cases, 1854 Wash. (Terr.) Laws 1st Sess. ch. 2, § 37, at 75, 81; An Act concerning crimes and the punishment of offenses against the persons of individuals, ch. 48, codified as KAN. (TERR.) STAT., ch. 48, § 10, at 236, 238 (1855) (Act of July 22, 1855).

394. Pre-1857 statutes requiring, to be punishable, an act be undertaken with intent to “procure miscarriage,” distinct from one to “destroy child” (in order of adoption): An Act Relative to Criminal Jurisprudence, div. 5, 1827 Ill. Rev. Laws, Criminal Code, div. 5, § 46, at 124, 131 (Act of Jan. 6, 1827); MO. REV. STAT. art. 2, § 36, at 168, 172 (1835); 2 N.Y. REV. STAT. pt. 4, ch. 1, tit. 6, § 21, at 689, 694 (1828); An Act Defining Crimes and Punishments § 18, 1838–1839 Iowa (Terr.) Acts 1st Sess. div. 1, § 18, at 142, 145 (Act of Jan. 5, 1839) (repealed in IOWA CODE tit. 1, ch. 4, § 28, leaving no statutory regulation of abortion in Iowa 1851–1858); OHIO GEN. STAT. ch. 35, § 111 (1841); An Act Regulating Punishments under the Penitentiary System (Penal Code), ch. 6, § 2, 1840 Ala. Acts ch. 6, § 2, at 143, 143; Act of Oct. 22, 1840, ch. 160, ME. REV. STAT. tit. 12, ch. 160, § 14, at 684, 686 (1841) (retained, though with higher punishment and combined in one section with “destroy child” provision, *in* ME. REV. STAT. tit. 11, ch. 124, § 9 (1857)); 1843–49 Or. (Terr.) Gen. Laws art. 3, § 1 (Act of June 27, 1844) (importing, wholesale, the 1843 laws of Iowa, including the “procure miscarriage” provision); 1845 N.Y. Laws 68th Sess. ch. 260, § 2, at 285, 286 (codified as 2 N.Y. REV. STAT. pt. 4, ch. 1, tit. 6, § 20 (1828–1845)); MICH. REV. STAT. tit. 30, ch. 153, § 34, at 657, 662 (1846); 1848 N.H. Laws Nov. Sess. ch. 743, § 1, at 708, 709; 1849–1850 Cal. Sess. Stat. ch. 99, § 45, at 233; 1854 Wash. (Terr.) Laws 1st Sess. ch. 2, § 38, at 75, 81; KAN. (TERR.) STAT., ch. 48, § 39, at 236, 243–44 (1855).

395. *See, e.g.*, 2 N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, art. 1, § 9 and tit. 6, § 20 (1828–1845); MO. REV. STAT. art. 2, §§ 10, 36 (1835); OHIO GEN. STAT. ch. 35, §§ 111, 112 (1841); 1848 N.H. Laws ch. 743, §§ 1, 2; MICH. REV. STAT. ch. 153, §§ 32, 33, 34, at 662 (1846); 1848 Va. Acts. tit. 2, ch. 3, § 9; 1854 Wash. (Terr.) Laws 1st Sess. ch. 2, §§ 37, 38; KAN. (TERR.) STAT. ch. 48, §§ 10, 39 (1855); ME. REV. STAT. tit. 11, ch.

therapeutic exception for an intervention (regardless of whether undertaken to “destroy a child” or “procure a miscarriage”) deemed necessary to “preserve the woman’s life,”³⁹⁶ which under humoral theory would encompass a broad range of curative practice.³⁹⁷ Many statutes distinguished “lawful” from “unlawful” abortion as the threshold element for prosecution,³⁹⁸ which, absent the background on humoral health and curative intent doctrine, could seem almost tautological.³⁹⁹ Some statutes repeated other intent elements from Lord Ellenborough’s Act⁴⁰⁰ that would exclude the mental state of a healthcare provider acting in good faith towards a person in need, i.e. requiring that an act be done

124, § 9 (1857) (penalizing an act with intent “to procure miscarriage” more lightly than one “to destroy a child”). Compare, generally, provisions cited *supra* note 393 and *supra* note 394.

396. Nearly all pre-1857 statutes, whether criminalizing an act to “destroy child” or to “procure miscarriage,” include an exception for any act undertaken to “preserve the life” of the woman. 1840 Ala. Acts ch. 6, § 2; ARK. REV. STAT. ch. 44, div. 3, art. 2, § 6 (1838); 1849–1850 Cal. Sess. Stat. ch. 99, § 45 (limiting therapeutic exception to physician “in discharge of his professional duties”); Act of Feb. 7, 1835, codified as IND. REV. STAT. ch. 26, § 3, at 224, 224 (1838) (“preserve the life” exception retained in amended abortion provision, Act of June 14, 1852 ch. 6, 2 IND. REV. STAT. pt. 3, ch. 6, § 36, at 424, 437 (1852)); IOWA (TERR.) REV. STAT. ch. 49, § 10 (1843) (amending criminal statute to replace prior “procure miscarriage” provision with a “destroy child” provision and adding exception for preserving a patient’s life) (repealed in IOWA CODE tit. 1, ch. 4, § 28, leaving no statutory regulation of abortion in Iowa 1851–1858); KAN. (TERR.) STAT., ch. 48, §§ 10, 39 (1855); ME. REV. STAT. tit. 12, ch. 160, §§ 13, 14 (1841) (retained in a single section, *in* ME. REV. STAT. tit. 11, ch. 124, § 9 (1857)); MICH. REV. STAT. tit. 30, ch. 153, §§ 33, 34 (1846); MINN. (TERR.) REV. STAT. ch. 100, §§ 10, 11 (1851); MISS. STAT. ch. 50, act 1, tit. 3, art. 1, § 9 (1839); MO. REV. STAT. art. 2, §§ 10, 36 (1835); 1848 N.H. Laws Nov. Sess. ch. 743, §§ 1, 2; 2 N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, art. 1, § 9 (limiting “preserve life” exception to “destroy child” provision but excluding it from “procure miscarriage” provision); OHIO GEN. STAT. ch. 35, §§ 111, 112 (1841); 1843–49 Or. (Terr.) Gen. Laws art. 3, § 1 (adopting 1843 Iowa provisions); 1848 Va. Acts. tit. 2, ch. 3, § 9; 1854 Wash. (Terr.) Laws 1st Sess. ch. 2, §§ 37, 38; WIS. REV. STAT. pt. 4, tit. 30, ch. 133, § 11 (1849); *see also* HAW. PENAL CODE §§ 1, 2, 3 (1850) (exception for “surgeon or other” saving the life of a woman). *But see* 1830 Conn. Laws ch. 1, § 16 (making no explicit exception, but encoding an implicit exception by retaining “willfully and maliciously” elements of first Connecticut statute); *see also* 1845 Mass. Acts & Resolves ch. 27; 1846 Vt. Acts & Resolves No. 33; N.J. Laws at 266 (1849); 1.L.A. REV. STAT. § 24, at 138 (1856) (post-1845 scandal statutes making no explicit therapeutic exception but encoding an implicit exception in mental state elements).

397. *See supra* Part I.A. and Part I.C.

398. In order of adoption, statutes invoking the “unlawful” distinction are: 1845 Mass. Gen. Laws ch. 27, at 322 (“maliciously or without lawful justification”); 1846 Vt. Acts & Resolves No. 33, § 1, at 34–35 (codified as Vt. Comp. Stat. tit. 28, ch. 108, § 8 (1851)) (“maliciously” or “without lawful justification”); 1849 N.J. Laws at 266–67 (“maliciously” or “without lawful justification”); HAW. PENAL CODE § 1 (1850) (“maliciously, without lawful justification”); LA. REV. STAT. § 24 (1856) (“feloniously administer”); *see also supra* text accompanying notes 280–88 (relating the background of the “unlawful” distinction in U.K. jurisprudence). Some state courts added to or reinforced statutory provisions in case law. *See e.g.*, *State v. Murphy*, 27 N.J.L. 112, 113 (Sup. Ct. 1858) (specifying act must have been done “without lawful justification”); *Commonwealth v. Wheeler*, 53 N.E. 2d 4 (Mass. 1944) (interpreting an act with therapeutic intent as “lawful”).

399. *See also supra* Part II.B.1 (explaining that the interpretation of “lawful” versus “unlawful” abortion in the U.K. hinges on curative intent).

400. Lord Ellenborough’s Act, 43 Geo. 3 ch. 58; *see also supra* Part II.B.1 (discussing these intent elements in the first U.K. abortion statute).

“maliciously”⁴⁰¹ or “willfully”⁴⁰² to be punishable. Courts typically understood these intent elements as preserving the logic of the common-law “life-health” defense.⁴⁰³

In short, out of the background of humoral health, the common-law life-health defense survived across jurisdictions, but in a growing divergence of forms. In different states’ laws, a variety of the features described in this Section⁴⁰⁴ appear in combination or in isolation. Some statutes prohibited abortion by blows, and all that did made no exception for therapeutic intent.⁴⁰⁵ Many statutes, by distinguishing “poison,” preserved the presumption of a healthcare motivation for potional abortion.⁴⁰⁶ Some statutes distinguished “unlawful” activity as a threshold element for prosecution, presuming measures intended to preserve a patient’s life “lawful,” thus encoding therapeutic intent.⁴⁰⁷ Intent elements excluded the mental state of a healthcare provider acting in good faith towards a patient.⁴⁰⁸ Nearly all statutes prohibiting intervention to “destroy a child” or “procure miscarriage” contained an explicit therapeutic intent exception, exempting from punishment an act taken to “preserve a woman’s life.”⁴⁰⁹ Some statutes provided a physician-consultation option, affording “irregular” caregivers assurance in asserting health necessity in the event of fatal mishap and a charge of

401. In order of adoption, statutes requiring, to be punishable, an act be undertaken “maliciously” are: CONN. STAT. tit. 22, § 14 (1821) (“maliciously”), *retained in amended provision in 1830 Conn. Laws.* ch. 1, § 16, at 255; 1827 Ill. Rev. Laws, Criminal Code, div. 5, § 46, at 124, 131 (“wilfully and maliciously”); IOWA (TERR.) STAT. 1st Legis., 1st Sess. § 18 (1838–1839) (“maliciously”); 1845 Mass. Acts & Resolves ch. 27 (“maliciously or without lawful justification”); 1846 Vt. Acts No. 33, § 1 (“maliciously” or “without lawful justification”); 1849 N.J. Laws tit. 2, § 75, at 146–47 (“maliciously” or “without lawful justification”); HAW. PENAL CODE ch. 12, § 1 (1850) (“maliciously, without lawful justification”; § 2 adds explicit life exception). *But see* ILL. REV. CODE div. 5, § 46, at 174, 179 (1833) (revision in poison section of statute removing “wilfully and maliciously” in regard to procuring abortion). *See also* IOWA (TERR.) REV. STAT. ch. 49, § 10 (1843) (revising statute to add an explicit “preserve-life” exception and omitting “maliciously”); 1843–49 Or. (Terr.) Gen. Laws art. 3, § 1 (adopting as the law of Oregon territory the 1843 Iowa laws).

402. *See, e.g.*, CONN. STAT. tit. 22, § 14 at 152, 153 (1821); 1827 Ill. Rev. Laws, Criminal Code, div. 5, § 46 (“wilfully”).

403. *See, e.g.*, *State v. Murphy*, 27 N.J.L. 112, 113 (Sup. Ct. 1858) (specifying to be considered an offense, the intervention must have been done “without lawful justification”); *Commonwealth v. Wheeler*, 53 N.E. 2d 4 (1944).

404. *See supra* text accompanying notes 383–403.

405. *See supra* note 315 (listing statutes prohibiting abortion by blows).

406. *See supra* Part II.B.2.a., especially text accompanying note 302 (regarding statutes regulating abortion in reference to poison).

407. *See supra* text accompanying note 398 (discussing the distinction of “lawful” and “unlawful” abortion in regard to therapeutic intent); *supra* text accompanying notes 280–88 (discussing same in British jurisprudence).

408. *See supra* text accompanying note 401 (discussing “maliciously” encoding therapeutic intent); *supra* text accompanying notes 289–90 (discussing same in British jurisprudence) *See supra* text accompanying note 402 (discussing “willfully” encoding therapeutic intent).

409. *See supra* text accompanying note 396–97 (discussing provisions excepting an act to “preserve” woman’s life).

patient homicide.⁴¹⁰ Most such provisions are survivors, some quite ancient, of common law doctrine developed within a milieu of humoral healthcare. They preserved the old respect for therapeutic intent in features of an emergent life-health exception.⁴¹¹

Over the short nineteenth century, abortion had become a locus of societal commentary on new intrusive practices and the epistemology producing them. In the next period, it increasingly became a target of hostility as a site for policing disciplinary boundaries, new conceptions of “health,” and new ethical commitments. The next Part explains how the health exception fared.

III. THE LONG TWENTIETH CENTURY

The period between 1857-1957, the “long twentieth century” for the health exception, saw a consolidation of the new ideas about health, with profound implications for abortion doctrine and the health exception. The first Section of this Part describes the epistemic landscape at the opening of the long twentieth century and the political maneuvers, centered in health and grounded in discourse about abortion, that wrought an earthquake in the practice of abortion and medicine more generally. The second Section discusses the forms of law that both promoted change and preserved older legal formulae appropriate to the waning health regime. The third Section uses the shifted senses of “health” to read and interpret the new statutes and the old language brought into new times.

A. HEALTH, LIFE, ABORTION IN THE LONG TWENTIETH CENTURY

1. Persistence of Humoral Ideas and Practice

The erosion of the humoral health regime took time. Even among formally educated physicians, in practice and belief humoral medicine co-existed with localized treatment,⁴¹² the legal and medical record show. Historian Charles Rosenberg reports that through the second third of the nineteenth century, older modes of therapeutics continued; practice was marked by a change in the intensity of their deployment rather than a categorical abandonment.⁴¹³ Even

410. See *supra* text accompanying notes 318–24. By 1857, a few states neither privilege the regular physician directly, nor provide the procedural safeguard of physician consultation as to necessity to evidence therapeutic intent. See, e.g., Indiana (IND. REV. STAT. §§ 1, 3, at 224 (1838) (Act of Feb. 7, 1835) (retained, unchanged in this respect, in amended abortion provision of 2 IND. REV. STAT. pt. 3, ch. 6, § 36, at 424, 437 (1852)); Maine (ME. REV. STAT., tit. 12, ch. 160, §§ 13, 14, 661, 686 (1841) (Act of Oct. 22, 1840)); Oregon (OR. STAT. ch. 3, § 13, at 187 (1853–1854)); Virginia (1848 Va. Acts tit. 2, ch. 3, § 9, at 96) (no physician required, but neither does advice of physician convey protection from prosecution).

411. See *supra* Part I.D. (describing preexisting common law features deferential to therapeutic intent).

412. Rosenberg, *Therapeutic Revolution*, *supra* note 222, at 47 (reporting that older therapeutic practices were not abruptly abandoned but were merely used with less frequency); see also *id.* (Physicians’ rhetoric disparaging humoral interventions notwithstanding, in the decades between 1850 and 1870, “[p]ractice changed a good deal less than the rhetoric surrounding it would suggest.”).

413. See *id.*

well after the Civil War, physicians still administered purgatives in spring and fall “to facilitate the body’s adjustment to the changing seasons.”⁴¹⁴ As late as 1897, uterine purgation remained such accepted practice that a U.K. court could not preclude curative intent in the administration of an abortifacient emmenagogue.⁴¹⁵ In 1908, defenders of humoral medicine spoke out against its detractors and alternatives.⁴¹⁶ A 1906 state-commissioned study characterized the New York midwife as “essentially medieval,” implying continued wide knowledge of and reliance on herbal preparations to aid contractions and expel fetus or afterbirth, and in 1910, about fifty percent of all U.S. births were still reported by midwives.⁴¹⁷ Across medical practice areas, dosage levels of humoral preparations decreased rather than ceased, and although bleeding sank into disuse, purgatives like mercury still figured in the practice of most physicians.⁴¹⁸ Medical schools’ anti-humoral rhetoric notwithstanding, in practice, clinicians “insure[d] the greatest possible degree of continuity with older ideas.”⁴¹⁹

As humoral medicine kept its tenacious hold on medical habits, first- and second-wave abortion legislation focused on lethal malpractice or rashly undertaken intrusive measures. In the hands of experienced caregivers, abortion in the course of emmenagogic treatment continued, still protected at law by a constructive health exception. Intentional termination of pregnancy continued without interference from the law in states that followed common-law doctrine. States that had passed abortion legislation incorporated a life-health exception in statutory language excepting from prosecution a procedure deemed necessary to preserve a woman’s life. Against this background, a revolution was to be waged using abortion as its battleground.

2. The A.M.A. Campaign and Stifling Knowledge Transmission

In 1847, formally trained physicians (so-called “regulars”) founded the American Medical Association (A.M.A.).⁴²⁰ Struggling to compete with midwives and other expert practitioners for business and public esteem, Mohr argues, they seized upon standardizing professional ethics to set themselves apart from “irregulars.”⁴²¹ A.M.A. members made the ancient Hippocratic Oath⁴²² of a

414. *Id.*

415. *Rex v. Collins*, 2 BRIT. MED. J. 122 (1898).

416. Rosenberg, *Therapeutic Revolution*, *supra* note 222, at 49 (quoting Abraham Jacobs denouncing one of the post-humoral approaches, so-called “expectant treatment,” as “too often a combination of indolence and ignorance,” “the sin of omission, which not infrequently rises to the dignity of a crime.”).

417. Francis Kobrin, *The American Midwife Controversy: A Crisis of Professionalization*, in Leavitt and Numbers, *SICKNESS AND HEALTH* *supra* note 222, at 197, citing J. Clifton Edgar, *The Remedy for the Midwife Problem*, 63 AM. J. OBST. & GYN. 882 (1911).

418. *Id.*

419. *Id.*

420. American Medical Association, *The Founding of the A.M.A.*, www.ama-assn.org/ama/hub/about-ama/our-history/the-founding-of-ama.page? (last visited Sept. 10, 2016).

421. See MOHR, *ABORTION IN AMERICA*, *supra* note 22, at 35 (arguing the Hippocratic Oath holds a special place in the history of ethics and identity formation among U.S. regular physicians).

physician to avoid hurt or damage⁴²³ the cornerstone of their project. In the original ancient Greek wording, the Oath includes swearing not to administer poison to anyone⁴²⁴ nor, in gynecological practice, to resort to late-term pessary.⁴²⁵ The A.M.A., however, seems to have relied on a mistranslation that rendered “pessary” as “abortion.”⁴²⁶ This purported citation to classical ethics and the project to create a distinct professional identity through standardized ethical norms came to underwrite a full program hostile to abortion⁴²⁷ led by a zealous A.M.A. subcommittee on “criminal abortion” formed in 1857.⁴²⁸

422. Siegel proposes that before the A.M.A. campaign, it was “not entirely clear” that physician’s ethics prohibited abortion. See Siegel, *Reasoning from the Body*, *supra* note 279, at 282 n.77. The history of medicine tells us that most people in the U.S. at that time were only coming to see pre-quickenings gestation as “pregnancy” and until this unsystematic shift in consciousness was complete, many would not recognize early-term intervention as abortion. See *supra* Part I.A. and Part II.A. (describing received doctrine, including quickening, and its continuation in the United States).

423. The Oath does not literally include the phrase, “First, do no harm” [*primum non nocere*], which probably comes from an adage in the Hippocratic text *Epidemics*, “Declare the past, diagnose the present, foretell the future; practice these acts. As to diseases, make a habit of two things: to help, or at least to do no harm.” *Epidemics, Book 1*, in HIPPOCRATIC WRITINGS 94 (Geoffrey Lloyd ed., 2nd ed. 1983). A translation of the Oath circulated in England in the first quarter of the nineteenth century has a physician swear, “With regard to healing the sick, I will devise and order for them the best diet, according to my judgment and means; and I will take care that they suffer no hurt or damage.” See *The Hippocratic Oath*, 3 LONDON MED. REPOSITORY: MONTHLY J. & REV. pt. 5, at 258, (James Copland ed., Jan.–June 1825) [hereinafter *The London Hippocratic Oath*] <http://books.google.ie/books?id=Oe0EAAAAQAAJ&pg=PA258#v=onepage&q&f=false>.

424. See *The London Hippocratic Oath*, *supra* note 423 (“Nor shall any man’s entreaty prevail upon me to administer poison to anyone; neither will I counsel any man to do so”).

425. 1 HIPPOCRATES 229 (W.H.S. Jones ed., 1934–88), cited in RIDDLE, ANCIENT ABORTION, ABORTION, *supra* note 33, at 173 n.28. Classical historian John Riddle would translate the disputed phrase, “Neither will I give a suppository to cause an abortion.” RIDDLE, ANCIENT ABORTION, *supra* note 33, at 9. We understand “abortion” to be, in the time of Hippocrates, a late-term procedure, hence my rendering of the Oath phrase as “late-term pessary.” See *supra* Part I.A.–I.C. Arabic-language custodians of the Hippocratic texts are clearer about the correct translation: Ibn Ali Usaybia (d. 1269), for example, renders it, in Arabic translation, “Nor will I contemplate administering any pessary which may cause abortion.” W.H.S. JONES, THE DOCTOR’S OATH: AN ESSAY IN THE HISTORY OF MEDICINE 31 (1924) (quoting Ibn Ali Usaybia).

426. Mohr argues that allegiance to the Oath in (mis)translation moved regulars to oppose abortion. MOHR, ABORTION IN AMERICA, *supra* note 22, at 65. To be clear, accounts about the A.M.A. physicians’ campaign against abortion tell us that A.M.A. members swore not to perform abortions as part of the nineteenth-century Hippocratic Oath; however, contemporaneous sources confirming the actual words physicians repeated when taking the Oath at that time are thin indeed. See Siegel, *Reasoning from the Body*, *supra* note 279, at 349 n.77 (calling for more research into the versions of the Oath employed by U.S. physicians during the antebellum period).

427. See Siegel, *Reasoning from the Body*, *supra* note 279, at 280–314 (describing the A.M.A. campaign); see also LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD, *supra* note 22, at 15–16 (describing the A.M.A. campaign as a “direct social struggle” led by elite “regular” physicians “as part of an effort to achieve other political and social goals”).

428. See MOHR, ABORTION IN AMERICA, *supra* note 22, at 147–170 (describing the physicians’ crusade against abortion). The campaign concentrates on changing public consciousness as well as legislation. “It may be asked,” poses one “informational” volume ostensibly written for women on sex and birth control, “if there is no latitude to be allowed [in regard to abortion] for extreme cases . . . We are compelled to answer, ‘None.’” HORATIO STORER, WHY NOT? A BOOK FOR EVERY WOMAN: A PROPER BOSTONIAN ON SEX AND BIRTH CONTROL (1864), excerpted in ROSE, ABORTION DOCUMENTARY GUIDE, *supra* note 25, at 11, 16.

The A.M.A. campaign successfully marshaled its arguments⁴²⁹ to score legislative and public relations victories.⁴³⁰ It consolidated regular physicians' hold on practice of abortion and their influence over its regulation,⁴³¹ with both direct and indirect effects on the health exception. The circumstances under which caregivers other than formally trained physicians could avail themselves of legal defenses shrank. Hinging assurance of a life-health defense on consultation with a regular physician⁴³² expanded to other jurisdictions,⁴³³ some requiring that the provider himself⁴³⁴ actually be a regular physician.⁴³⁵

429. *American Medical Association, Report on Criminal Abortion* (1859), reprinted in ROSE, ABORTION DOCUMENTARY GUIDE, *supra* note 25, at 8, 10; *see also* Siegel, *Reasoning from the Body*, *supra* note 279, at 280–314 (describing arguments for defense of patriarchal institutions the A.M.A. campaign raises).

430. *See, e.g.*, MOHR, ABORTION IN AMERICA, *supra* note 22, at 200–226 (detailing anti-abortion legislation resulting from the A.M.A. campaign).

431. *See id.* at 88–118 (describing the widespread practice of abortion outside the hands of “regular” physicians before the campaign); *id.* at 200–245 (documenting their success in having outlawed the competition’s practice after the campaign). The rare irregular who practiced commercial-scale abortion, if known, became famous as an exception. *See, e.g., generally*, RICKIE SOLINGER, THE ABORTIONIST (1994) (on the famously successful irregular practitioner Ruth Hanna of Portland, Oregon, who practiced from 1918–1968); *see also, e.g.*, CATHERINE CUSSET, THE STORY OF JANE (2001) (on laywomen who learned to perform abortion for each other before re-legalization in *Roe v. Wade* as a form of altruism and empowerment).

432. *See supra* note 322 (listing pre-1857 physician-consultation statutes).

433. In order of adoption, additional physician-consultation statutes are, for example: WIS. REV. STAT. ch. 164, § 11 (1858); 1868 Fla. Acts 1st Sess., ch. 1637, 3, § 11; 1869 Wyo. (Terr.) Laws 1st Sess., ch. 3, § 25, at 104; Act of March 1, 1873, ch. 58, 1873 Neb. Gen. Stat. ch. 58, pt. 1, ch. 2, § 6, ch. 6, § 39, at 720, 727–28 (two physicians); Act of Mar. 18, 1907 § 6, 1907 N.M. (Terr.) Acts 37th Sess. ch. 36, § 6, at 41, 42; An Act to Prevent and Punish Foeticide or Criminal Abortion in the State of Georgia, Act of Feb. 25, 1876, 1876 Ga. Laws. No. 130 §§ 2, 3; MISS. CODE § 2223 (1942); MO. REV. STAT. § 559.100 (1949); *see also* TEX. GEN. STAT. DIG. ch. 7, art. 536, at 524 (Oldham & White 1859) (excepting abortion procured or attempted on “medical advice”); An Act to Amend the Criminal Code of this State in relation to the Offense of Abortion, Act of Feb. 28, 1867 § 3 1867 Ill. Pub. Laws 25th Gen. Assembly 1st Sess. § 3, at 89 (excepting “any person” acting “for *bona fide* medical or surgical purposes”).

434. The use of the male pronoun here is deliberate, as almost all medical schools excluded female students and almost all formally trained physicians were male. The regendering of medical care, particularly gynecology, and the effects of reinforcing patriarchal institutions at the expense of women and their expertise have been the subject of many erudite works on the history of abortion in the U.S. *See infra* text accompanying notes 436–439.

435. Post-1857 statutes that limited the benefit of a life-health exception to physicians include (in order of adoption): 1861 Nev. (Terr.) Laws ch. 28, § 42, at 63; 1863–1864 Idaho (Terr.) Laws § 42, at 435 (limiting exception to “physician” who, “in discharge of his professional duties,” “deems it necessary” to “save her life”); *see also* 1864 Mont. (Terr.) Laws § 41, at 184; ARIZ. HOWELL CODE ch. 10, § 45 (1865); Act of Nov. 8, 1875, § 21, 1875 Ark. Laws 4th Adj. Sess. § 21, at 5 (“any regular practicing physician”); *see also* Act of Apr. 14, 1881 ch. 87, An Act concerning Public Offenses and their Punishment, 1881 Ind. Laws Spec. Sess. ch. 37, § 23, at 177 (making liable the woman herself who solicits intervention to procure miscarriage “except when by a physician for saving the life of mother or child”); *see also* MD. LAWS ch. 179, § 2, at 315 (1868) (requiring provider be physician who consults with one or more other “respectable physicians”). *But see* IDAHO COMP. LAWS ch. 5, § 42, at 328 (1874–1875) (changing the category covered by the provision to “physician practitioner”); ARIZ. REV. STAT. § 454, at 138 (1887) (expanding the defense to include any person of the opinion that inducing miscarriage was “necessary to preserve the woman’s life”).

Tying legal practice of abortion to formally trained physicians drove “irregulars” from practice;⁴³⁶ doing so at a time when most medical schools excluded female students⁴³⁷ put women out of the running for providing women’s healthcare,⁴³⁸ reinforcing patriarchal gender inequities in new ways.⁴³⁹ In addition to these important sociological effects, there is an untold story of epistemic consequences. First, together with restrictions on who might lawfully perform abortion runs the subtext of delegitimizing “abortion” in order to delegitimize humoral health. Certain categories of practitioners had not been trained in humoral health, not educated about blocked menses nor about the potional purgatives that might restore menstruation.⁴⁴⁰ Restricting the category of lawfully performed abortion to such formally trained practitioners ruled out those who restored menstruation with emmenagogues or abortifacients under humoral diagnoses and cures. Second, the damage to humoral practice extended beyond that generation of practitioners. The A.M.A. anti-abortion campaign and the “third wave” of legislation it produced blocked the transmission of knowledge about humoral health theory and practice insofar as it related to abortion.⁴⁴¹ Written information was suppressed under federal legislation resulting from the A.M.A. campaign (so-called “Comstock Laws”)⁴⁴² and its state-law imitators prohibiting advertising or distributing information about abortifacient herbs, instruments, or practitioners.⁴⁴³ Oral traditions of knowledge

436. See generally MOHR, *ABORTION IN AMERICA*, *supra* note 22.

437. See *supra* note 328.

438. See Siegel, *Reasoning from the Body*, *supra* note 279, at 287; LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD*, *supra* note 22, at 30–31.

439. See Cohen, *A Jurisprudence of Doubt*, *supra* note 13, at 204–217.

440. See *supra* note 328.

441. After the A.M.A. abortion committee report came out in 1859 but still before the 1873 federal obscenity legislation, a few jurisdictions restricted advertising information about inducing miscarriage. See, e.g. (in order of adoption): KAN. GEN. LAWS ch. 28, § 10 (1859) (excepting publication of “standard medical works”); 1860 Conn. Pub. Acts ch. 71, § 4; 1867 Vt. Acts No. 57, § 3; Act of Mar. 14, 1867, ch. 216, 1867 R.I. Pub. Laws Jan. Sess. (codified as amended at R.I. GEN. STAT. tit. 30, ch. 232, § 23) (amending criminal “decency” law to prohibit *inter alia* advertising any person with “information or knowledge” about causing miscarriage); 1868 Fla. Acts 1st Sess., ch. 1637, III, § 10; 1868 Md. Laws ch. 179, § 2, at 315; 1869 Mich. Laws ch. 106, § 2, at 175 (advertising any compound medicine of an “immoral” nature or publishing any recipe); 1870 Pa. Laws No. 19, § 2; ILL. REV. STAT. ch. 38, § 4, at 369 (1871–1872) (additionally restricting pharmacists). Massachusetts was the only state that anticipated the A.M.A. campaign, criminalizing in its “second wave” post-scandal legislation distributing or advertising any drug or instrument for use in abortion. 1847 Mass. Stat. ch. 83, § 10.

442. Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use [Comstock Act], 18 U.S.C. §§ 1461, 1463, 1735 (1873), *reprinted in* ROSE, *ABORTION DOCUMENTARY GUIDE*, *supra* note 25, at 19–21. The legislation takes its name from New York policeman Anthony Comstock, who gained prominence wrangling with Madame Restell and, subsequently elected to Congress, sponsored federal obscenity legislation. ROSE, *supra*.

443. After federal legislation passed, other states and territories passed “Comstock statutes” that prohibited the advertising of means of potional or instrumental abortion. See, e.g. (in order of adoption), 2 MINN. STAT. ch. 54, Sec. 29, § 4, at 987 (1873); Act of Nov. 8, 1875, § 2, 1875 Ark. Laws 4th Adj. Sess.; 1881 Ind. Laws ch. 37 § 93; 1883 Del. Laws ch. 226, § 1, at 522; IDAHO REV. STAT. (PENAL CODE) § 18-603 (1887); D.C. CODE ch. 19, § 872 (1901); ARIZ. REV. PENAL CODE § 288 (1901); 2 NEV. REV.

transmission about humoral health⁴⁴⁴ were similarly disrupted.⁴⁴⁵ In states with such statutes, much of the work of those with knowledge of potional emmenagogues and abortifacients was exposed to criminal liability. Even if it continued underground for those in current need, the lack of open practice made this knowledge less available for new practitioners to learn. Third-wave legislation restricting abortion practice succeeded both in prohibiting abortion practice and blocking the transmission of knowledge that otherwise could have been available to future generations.

It took decades to eradicate knowledge. The waning of humoral health theory and the abortion practices it supported resulted in part from a conscious switch to new theories of health or concerted attempts to moralize and stigmatize. However, change can happen as collateral damage as well. Knowledge eradication accelerated with the suppression of humoral knowledge and the transmission of information about effective potional abortion.

Against this background of suppressing information about abortion and undercutting a regime of health that had promoted it, states also enacted statutes that preserved common-law therapeutic intent doctrine. The next Section reports on old legal formulations deployed in new abortion-restricting statutes.

B. LAW

1. The Imprint of Humoral Health

In regard to the therapeutic exception, statutes enacted between 1857 and 1959 in the “third wave” of legislative activity on abortion⁴⁴⁶ continued trajectories

LAWS pt. 4, ch. 14, § 187 (1912); 1920 La. Acts No. 95, § 1; N.J. REV. STAT. ANN. § 2A:170-76 (1953); ME. REV. STAT. ANN. ch. 134, § 11 (1954) (prohibiting publishing abortifacient recipe); MISS. CODE ANN. § 2289 (1956) (including giving information orally); VA. CODE ANN. § 18.1-63 (Supp. 1960).

444. See *supra* Part I.A.1 and Part I.C.

445. See, e.g. (in order of adoption), 1847 Mass. Stat. ch. 83, § 10. (prohibiting selling or giving away a drug or instrument, as well as advertising it, for “unlawful” abortion); 1869 N.Y. Laws ch. 631, § 2, at 1502 (prohibiting supplying any substance to be “unlawfully” used); N.Y. GEN. STAT. ch. 181, § 3, at 71 (1872) (making manufacturing, selling, or giving away any drug for producing miscarriage a felony); ILL. REV. STAT. ch. 38, § 4, at 369 (1871–1872) (restricting pharmacists); 1911 Nev. Laws, Crimes and Punishments, § 183 (codified at 2 NEV. REV. LAWS pt. 4, ch. 14, § 6448 (1912)) (prohibiting making, selling, or giving away any substance known to cause abortion); IOWA CODE § 205.1 (1946) (prohibiting sale, delivery, or giving away named products—cotton root, ergot, oil of tansy, oil of savin, or derivatives of any of them—all known emmenagogue and/or abortifacients, unless to a physician, veterinarian, or dentist and prohibiting pharmacist from filling prescription for an abortifacient unless prescribing doctor is personally known to the pharmacist (and even then, prohibiting refills)); MINN. STAT. ANN. § 617.25 (1953) (adding a prohibition on selling an abortifacient drug to statutory prohibition on advertising). These efforts carried on well beyond the nineteenth century. See N.J. REV. STAT. ANN. §§ 2A:170-76 (1953) (criminalizing “uttering” or “exposing to view” any instrument or medicine for abortion, or even recommending against it); see also VA. CODE ANN. § 18.1-63 (Supp. 1960) (prohibiting publication, sale or circulation of a publication, or even *lecture* that might “encourage or prompt procuring abortion or miscarriage”).

446. For a catalogue of such state statutes, see Quay, *Justifiable Abortion*, *supra* note 223, at 447–520 (cataloguing in Appendix I state statutes on abortion 1821–1960 with excerpts of relevant statutory text).

incipient in the first⁴⁴⁷ and second waves.⁴⁴⁸ This Section describes some of their general features, with a few illustrative examples.

Even as a background belief in humoral health waned during this period, humoral theory continued to shape features of the epistemic landscape in regard to regulation of abortion at law. First, its knowledge and practices continue to appear in legal provisions⁴⁴⁹ long after humoral theory dropped from medical school curricula and faded in regulars' consciousness.⁴⁵⁰ As late as 1954, for example, well into an era in which commercial drugs had replaced local herbalists' preparations, Maine statute prohibited publishing, or distributing any publication of, any "recipe" tending to cause abortion.⁴⁵¹ Procedures that had no health-care justification under humoral health, such as abortion by blows, continued to be singled out for criminalization without therapeutic exception.⁴⁵²

Second, humoral health shaped legal doctrine in distinctions and formulations that survived much longer than the health theory that informed them. For example, the humoral distinction between a uterine purgative intended to cure (knowing that purgatives could also induce miscarriage) versus a procedure intended to "destroy a child" in the womb⁴⁵³ survived. In medical practice, this

For a detailed history of abortion practice and legislative, court, and policy battles over it between 1917–1972, *see* GARROW, *LIBERTY AND SEXUALITY*, *supra* note 22.

447. *See supra* Part II.B.2.

448. *See supra* Part II.C.

449. *See, e.g.*, 1871-1872 Ill. Laws ch. 38 § 4, at 369 (prohibiting sale of substance "known or presumed to be ecbolic or abortifacient" except upon written recommendation of "well known and respectable practicing physician").

450. *See, e.g.*, IOWA CODE § 205.1 (1946) (prohibiting selling or giving away substances known as abortifacients under humoral health care—cotton root, ergot, oil of tansy, oil of savin—except to physicians, veterinarians, or dentists).

451. *See* ME. REV. STAT. ANN. ch. 134, § 11 (1954).

452. *See* for example the first provision of Georgia's abortion regulation statute. An Act to Prevent and Punish Foeticide [*sic*] or Criminal Abortion in the State of Georgia, 1876 Ga. Laws No. 130, § 1, at 133 (Act of Feb. 25, 1876) (making the willful killing of an unborn quick child by injury to the mother a felony punishable by death or imprisonment, without the therapeutic exception that covered the law's provisions in regard to abortion by potion or by instrument). Some later statutes modified slightly the previously highly standardized language of the abortion-by-blows provision, but the distinction made for abortion by blows survives, as does the presumption made under humoral health that, inherently dangerous to the patient, it could not be justified by therapeutic intent. Compare, for example, two separate provisions of the homicide section of 1910 Oklahoma criminal law. The statute includes one provision, headed "Killing an unborn quick child," criminalizing "the wilful killing of an unborn quick child by any injury committed upon the mother of such child." 1 OK. REV. LAWS ch. 23, art. 18, § 2322 (1910). The next section, termed "Procuring destruction of an unborn child," criminalizes as a distinct offense procuring miscarriage by potion or by instrument if the death of the "child or of the mother" results. This section includes a "life exception" for an act meant to "preserve the life of such mother," where the abortion by blows section does not. 1 OK. REV. LAWS ch. 23, art. 18, § 2323 (1910). For the persistence of abortion-by-blows prohibitions in other twentieth-century statutes, *see, e.g.*, 4 ARK. STAT. ANN. § 41-2229 (1964); 22 FLA. STAT. ANN. § 782-09 (1965); 2 KAN. STAT. ANN. § 21-409 (1964); 25 MICH. STAT. ANN. § 28.554 (1954); 2A MISS. CODE ANN. § 2222 (1942); 2 N.D. CENTURY CODE § 12-25-03 (1960); OKLA. STAT. ANN. tit. 21, § 713 (1958).

453. *See supra* Part I.A (describing humoral theory); HALE, *PLEAS OF THE CROWN*, *supra* note 60 (in legal doctrine that reflects humoral theory, distinguishing between a medical intervention "to cause

distinction became less stark the more that embryology changed ideas about conception, gestation, and life and the further that health ideology departed from humoral health. Nonetheless, the distinction appeared in the statutes of sixteen states before 1857⁴⁵⁴ and in thirteen more between 1857 and 1959.⁴⁵⁵ Only a few of the states that made this distinction abolished it before 1959, and they did so surprisingly late.⁴⁵⁶ Another example of the preservation of legal formulations suited to humoral health is the special treatment later law gave to “poison,”⁴⁵⁷ reflecting prior medical and legal distinction of “poisoning” from potional abortion at a time of widespread knowledge of powerful plant preparations.

We identified two legal doctrines under the humoral regime associated with health under which abortion took place, the constructive health exception and the life-health exception.⁴⁵⁸ With the waning of humoral theory, the emmenagogue as a logic of practice practically disappeared, and with it, much of the basis for

miscarriage” versus “to destroy the child within her”); *supra* Part I.D.3 (discussing Hale’s formulation of curative intent defense).

454. *See supra* note 393.

455. Compare, for example, two sections of one 1881 North Carolina statute. The first section made it a felony to administer a substance or employ an instrument on a pregnant woman “with intent thereby to destroy said child.” Act of March 12, 1881 ch. 35, An Act to Punish the Crime of Producing Abortion, 1881 N.C. Sess. Laws ch. 351, § 1, at 584. The second section made it a misdemeanor to do the same “with intent thereby to procure the miscarriage of any such woman.” Act of March 12, 1881 ch. 35, An Act to Punish the Crime of Producing Abortion, 1881 N.C. Sess. Laws ch. 351, § 2, at 584. (Alarming, the second section of the North Carolina statute relegates to the misdemeanor passage acting with intent “to injure or destroy such woman.” Act of March 12, 1881 ch. 35, An Act to Punish the Crime of Producing Abortion, 1881 N.C. Sess. Laws ch. 351, § 2, at 584–85.) Just thirty years later, Kentucky legislators used language much more consistent with our contemporary thinking, while providing a specificity that implies some users of the law might be less clear, and while allowing that technologies of verification have still not caught up with the certainty of legal categories. Section one of the law, criminalizing attempt, encompassed an act intended to procure miscarriage towards “any pregnant woman, or to any woman he has reason to believe pregnant, at any time during the period of gestation” (emphasis added). Section two made an act resulting in a successfully procured miscarriage, “causing the death of the unborn child,” a felony; section three makes a resulting death of the woman herself murder or manslaughter, “as the facts may justify.” Act of March 22, 1910, An Act Defining the Crime of Abortion and Prescribing a Penalty Therefore, 1910 Ky. Acts ch. 58, §§ 2, 3, at 189–90. For a convenient reprinting of other statutes making the distinction between intent to destroy a child versus procuring miscarriage, *see* Quay, *Justifiable Abortion*, *supra* note 223 (listing abortion-regulating statutes passed between 1821 and 1961).

456. *See, e.g.,* WASH. REV. CODE § 9.02.010 (1951) (revising statutory provision to equate “miscarriage” with “abortion”).

457. *See supra* Part II.B.2.a. (describing the first U.S. statute restricting the practice of abortion as strictly a “poison” control measure); *see also, e.g.,* 1868 Fla. Acts 1st Sess. ch. 1637 (lumping abortifacient drugs and medicine with “poison and any noxious thing”); An Act Concerning Crimes and Punishments, 1864 Mont. (Terr.) Laws 1st Legislative Assembly ch. 3, § 41, at 184 (placing provision on abortion by potion or instrument within poison-control section of statute); Act of March 1, 1873, ch. 58, 1873 Neb. Gen. Stat. ch. 58, pt. 1, ch. 6, § 39, at 727–28 (adding provision on attempt to procure miscarriage to the chapter of the criminal code on attempted poisoning, lumping abortion by instrument together with administering “medicine, drug, substance, or thing whatsoever”); An Act Concerning Crimes and Punishments, Nov. 26, 1861, 1861 Nev. (Terr.) Laws ch. 28, § 42, at 63 (codified as NEV. COMP. LAWS ch. 55, pt. 4, § 2348 (1873); R.I. GEN. LAWS ch. 277, § 22, at 977 (1896) (prohibiting using “poison or other noxious thing,” or an instrument, on a woman pregnant or supposed pregnant)).

458. *See supra* Part I.D.4.

the “constructive health exception.”⁴⁵⁹ The logic of the life-health defense,⁴⁶⁰ however, survived and thrived. At the beginning of the “long twentieth century,” when there was still little practical difference between a measure to preserve a woman’s life and to preserve her health, the “life exception” continued in practice as a “life-health exception.”⁴⁶¹ In fact, as embryology redefined “pregnancy” back to conception, more procedures could be classified as “abortion”⁴⁶² at the same time that legal restrictions on information about, and access to, abortion increased.⁴⁶³ With these developments, therapeutic intent doctrine became more important in women’s healthcare.

2. The Implicit Health Exception

Some state legislatures preserved common-law intent doctrine by encoding an implicit exception⁴⁶⁴ in the language of a statutory prohibition itself in intent elements requiring an act be done “maliciously,”⁴⁶⁵ “unlawfully” (or “without lawful justification”),⁴⁶⁶ or “wilfully.”⁴⁶⁷ In other states, courts construed an

459. See *supra* Part I.D.4.a.

460. See *supra* Part I.D.4.b.

461. See Part I.D.4.b. (arguing that the legal doctrine of a defense of acting to save a patient’s life, in a time of no practical distinction between preserving “life” and “health,” be understood in actuality as a “life-health defense”).

462. See *infra* text accompanying notes 476–478 (describing the changing understandings of the relationship between conception and life with the development of embryology and that the entrenchment of embryology redefines “pregnancy” and thus “abortion” back to conception).

463. See *supra* Part III.A.2 (describing abortion restrictions that in effect stifle knowledge transmission).

464. Some jurisdictions had incorporated an implicit exception in the first wave of abortion legislation. See *supra* Part II. D; see also *supra* notes 398, 401–02 (listing them).

465. For post-1857 adoption of the implicit exception in the requirement of “malicious” intent in a practitioner, see, for example (in order of adoption), HAW. PENAL CODE ch. 12, § 1 (1869) (“maliciously, without lawful justification”); 1869 Wyo. (Terr.) Sess. Laws 1st Sess. ch. 3, § 25, at 104, (“willfully and maliciously”); N.J. REV. STAT. ANN. §§ 2A:87-1 (1953) (“maliciously and without lawful justification”).

466. For post-1857 adoption of the implicit exception in the requirement of “unlawful purpose” or that an act took place “without lawful justification,” see, for example (in order of adoption), 1860 Pa. Laws No. 374, §§ 87, 88 (“unlawfully”); 1868 Fla. Acts 1st Sess. ch. 1637 (“unlawfully”); HAW. PENAL CODE ch. 12, § 1 (1869) (“maliciously, without lawful justification”); 1869 N.Y. Laws ch. 631, §§ 1, 2, at 1502 (“unlawfully”); N.J. REV. STAT. ANN. §§ 2A:87-1 (1953) (“maliciously and without lawful justification”). Some states used “unlawful” or “criminal” abortion, not justified by the life-health exception, as a measure of “unprofessionalism,” making performing unlawful abortion grounds for stripping a regular physician of his license. See, e.g., H. B. 120, 1938 Miss. Extraordinary Session, reported in MISS. CODE ch. 148, § 2011, at 1321 (1930) (Supp. 1938) (amending 1930 Code section 5863 (a) (5), to list procuring, attempting, or pretending to procure any abortion not necessary to preserve the life of a pregnant woman among causes authorizing State Board of Health to revoke a physician’s license); see also, for example, similar statutes linking abortion to physician licensing: Act of Apr. 5, 1911, § 2 (codified as 1 ALA. CODE ch. 52, art. 1, § 2847(5), at 1279, 1283 (1923) (amending existing state medical-practice certification provision to add, as a cause for revocation, inducing “criminal” abortion, miscarriage, or premature delivery unless, when done to save her life, attending physician “use due diligence to obtain the advice and help of one or more consulting physicians”); 1914 La. Acts No. 54, § 10.1 (codified as LA. REV. STAT. ANN. §§ 14:8, at 889 (West 1950)); 1917 Alaska Sess. Laws §§ 7, 8; MD. ANN. CODE § 3 (West 1924); OR. COMP. LAWS ANN. ch. 9, art. 1, § 54-931 (1940); IOWA CODE § 147.56 (1946); MO. REV. STAT. §§ 559.100 (1949); FLA. STAT. ANN. § 458.12 (1952); 1955 HAW. REV. LAWS § 60-9 (“criminal” abortion).

implicit life-health exception.⁴⁶⁸

The implicit exception enjoyed less consistent interpretation across jurisdictions in the United States than in the United Kingdom.⁴⁶⁹ A Kentucky court, for example, turned the “lawful” justification against an abortion practitioner, finding that although the common law had not made pre-quickening abortion a felony, the death of a woman from a pre-quickening procedure was “murder” because it was done “without lawful purpose and dangerous to life.”⁴⁷⁰ Even statutes within a single jurisdiction can seem at odds. In Louisiana, for example, criminal law and physician licensing statutes contradict each other or, perhaps, evidence an attempt to deal with an economy of abortion practice driven underground. The criminal statute expansively defined abortion as administering any potion or using any instrument on a pregnant female for the purpose of procuring premature delivery of an embryo or fetus, subjecting anyone convicted of the “crime of abortion” to imprisonment at hard labor for one to ten years without exception.⁴⁷¹ However, the state’s physician licensing statute, listing abortion as grounds to revoke a medical license, excepted from sanction abortion “done for the relief of a woman whose life appears in peril after due consultation with another licensed physician.”⁴⁷²

3. The Explicit Health Exception

Most states, following the early New York example,⁴⁷³ straightforwardly included an explicit “life exception” in their abortion-regulating statutes.⁴⁷⁴

467. For post-1857 adoption of the implicit exception in the requirement that an act be done “wilfully,” see, for example (in order of adoption), 1867 R.I. Acts & Resolves Jan. Sess. ch. 689, § 1 (“wilfully administering”); 1869 Wyo. (Terr.) Sess. Laws 1st Sess. ch. 3, § 25, at 104, (“willfully and maliciously”); Act of March 1, 1873, ch. 58, 1873 Neb. Gen. Stat. ch. 58, pt. 1, ch. 2, § 6, ch. 6, §39, at 720, 727–28 (“wilfully”); 1881 N.C. Sess. Laws ch. 351, § 1, at 584 (“wilfully administer”); see also 1868 Md. Laws 315 (not specifying other intent elements but adding “knowingly”).

468. See, e.g., *Passley v. State*, 21 S.E.2d 230, 232 (Ga. 1942) (statutory provisions criminalizing causing death to a woman (§ 26-1103) or a quick fetus (§ 26-1101) as a consequence of abortion procedure require “malice” towards, respectively, the deceased woman or the fetus); *Commonwealth v. Wheeler*, 53 N.E. 2d 4 (Mass. 1944) (requiring act to have been “unlawful,” “malicious,” “without lawful justification”).

469. See *supra* text accompanying note 403. See generally KEOWN, ABORTION, DOCTORS, AND THE LAW, *supra* note 38.

470. *Peoples v. Commonwealth*, 9 S.W. 509, 511 (Ky. 1888).

471. LA. REV. STAT. ANN. § 807 (1870).

472. 1914 La. Acts No. 56 §16.

473. See *supra* note 396 (listing jurisdictions that had adopted an explicit exception permitting procedure necessary to “preserve” woman’s life).

474. Joining the earlier adopting jurisdictions, *id.*, after 1857 those with an explicit exception are (in chronological order): MISS. REV. CODE ch. 64, § 34, art. 173, at 601 (1857); TEX. DIGEST OF GEN. STAT. LAWS, PENAL CODE, pt. 2, tit. 17, ch. 7, art. 536, at 524 (1859); 1860 Conn. Pub. Acts ch. 71, §§ 1, 3, at 65 (codified as CONN. GEN. STAT. tit. 12, ch. 2, §§ 22, 24 (1866)); An Act Concerning Crimes and Punishments, 1861 Nev. (Terr.) Laws ch. 28, § 42, at 63 (Act of Nov. 26, 1861) (codified as NEV. COMP. LAWS ch. 55, pt. 4, § 2348 (1873)); An Act Concerning Crimes and Punishments, 1864 Mont. (Terr.) Laws 1st Legislative Assembly ch. 3, § 41, at 184; Act of Mar. 14, 1867 ch. 689, 1867 R.I. Acts & Resolves Jan. Sess. ch. 689, § 1, at 148; Act of Nov. 21, 1867 § 1, 1867 Vt. Acts & Resolves No. 57, § 1, at 64; MINN.

Differences in the details, though, show a lack of consensus in basic understandings of pregnancy and its threat to women's health. For example, across different jurisdictions legislatures and courts differed as to the burden of proof in the life-health exception. There are two threshold matters of proof. First is proving that abortion had happened in the first place, *i.e.*, that a woman was pregnant before the procedure. Some courts required "quickening" as *prima facie* evidence of pregnancy.⁴⁷⁵ Some legal authorities dropped "quickening"⁴⁷⁶ as science

GEN. STAT. ch. 94, § 11 (1866) (*repealed by, but life exception replicated in*, Act of March 10, 1873, ch. 9, An Act to Punish Abortionists and Attempts to Procure Abortion, and Improper Advertising in that Direction, 1873 Minn. Gen. Laws 15th Sess. ch. 9, § 1 (codified as 2 MINN. STAT. AT LARGE ch. 54, Sec. 29, §§ 1, 3, at 987 (1873)); Act of March 1, 1873, ch. 58, 1873 Neb. Gen. Stat. ch. 58, pt. 1, ch. 2, § 6, ch. 6, § 39, at 720, 727–28; The Penal Code of Utah § 142, 1876 Utah (Terr.) Laws 22nd Sess. § 142 (Act of Feb. 18, 1876) (codified as UTAH (TERR.) COMP. STAT. tit. 21 Penal Code, tit. 9, ch. 3, § 142 (1876)); An Act to Punish Procurement of Abortion, Feb. 13, 1883 ch. 226, 1883 7 Del. Laws pt. 1, tit. 20, ch. 226, § 2, at 523; DAK. (TERR.) REV. CODES, PENAL CODE ch. 29, §§ 337, 338, at 776 (1877) ("necessary to preserve her life"), *adopted as* N. DAK. REV. CODES, PENAL CODE ch. 30, §§ 7177, 7178, at 1271-72 (1895) *and* S. DAK. REV. CODES, PENAL CODE ch. 29, §§ 342, 343, at 1134 (1903); An Act concerning Public Offenses and their Punishment ch. 87, 1881 Ind. Laws Spec. Sess. ch. 37, §§ 22, 23, at 177 (Act of Apr. 14, 1881); An Act to Punish the Crime of Producing Abortion, 1881 N.C. Sess. Laws ch. 351, § 1, at 584 (Act of Mar. 12, 1881); An Act to Amend the Criminal Law by Providing for the Punishment of Abortion, 1883 S.C. Acts No. 354, 99 §§ 1, 3, at 547–48 (Act of Dec. 24, 1883); An Act to Punish Criminal Abortion, 1883 Tenn. Pub. Acts ch. 140, §§ 1, 2, at 188–89 (Act of March 23, 1883); 1890 Okla. (Terr.) Gen. Stat. 1st Regular Sess. ch. 25, art. 29, §§ 1, 2, at 459 (codified as OKLA. GEN. STAT. ch. 25, art. 29, §§ 1, 2 (1890)); An Act to Define and Punish Crimes in the District of Alaska and to Provide a Code of Criminal Procedure for Said District (enacted by Senate and House of Representatives of the United States in Congress assembled) 30 Stat. L., 1253 Alaska Criminal Code (Act of Mar. 3, 1899), *published as* ALASKA (TERR.) LAWS pt. 1 (Penal Code), ch. 2, § 8, at 3 (1900); Act of Mar. 18, 1907 § 6, 1907 N.M. (Terr.) Acts 37th Sess. ch. 36, § 6, at 41, 42; An Act Defining the Crime of Abortion and Prescribing a Penalty Therefore, 1910 Ky. Acts ch. 58, § 1, at 189 (Act of March 22, 1910); The Code of Alabama, Crimes and Offenses, Act of July 2, 1940, tit. 14, ch. 2, § 9, 4 ALA. CODE tit. 14, ch. 2, § 9, at 7 (1940); *see also* An Act to Amend the Criminal Code of this State in relation to the Offense of Abortion, §§ 2, 3 1867 Ill. Pub. Laws 25th Gen. Assembly 1st Sess. §§ 2, 3, at 89 (Act of Feb. 28, 1867) (abortion criminalization provisions shall not apply to "any person" attempting or procuring miscarriage "for *bona fide* medical or surgical purposes"); *see also* LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD, *supra* note 22, at 30–35 (discussing the meaning of "saving the life" of a woman in the last quarter of the nineteenth century and Horatio Storer's and other A.M.A. anti-abortion crusaders' own arguments for performing abortion to save a woman's life).

475. *See, e.g.*, *Weightnovel v. State*, 35 So. 856, 859 (Fla. 1903) (state must prove pregnancy via quickening, as well as acts undertaken with intent to destroy the fetus) (citing *State v. Emerich*, 87 Mo. 110 (1885); *People v. Olmstead*, 30 Mich. 431 (1874)); *Armstrong v. State*, 145 So. 212, 212 (Fla. 1933); *Johnson v. State*, 91 So. 2d 185, 186-91 (Fla. 1956) (state must prove quickening and effort to cause abortion); *Taylor v. State*, 33 S.E. 190 (Ga. 1899) (holding the state must prove quickening to allege abortion); *Summerlin v. State*, 103 S.E. 461, 462–63 (Ga. 1920) (language implying fetus not quick means statutory abortion prohibition does not apply); *Hunter v. State*, 115 S.E. 277, 277 (Ga. Ct. App. 1923) (state must prove quickening beyond a reasonable doubt); *Passley v. State*, 21 S.E.2d 230, 232 (Ga. 1942) (lesser penalty under statute applies when child was not quick)).

476. The Tennessee act criminalizing abortion exemplifies some of the flux in the notion of pregnancy and helps us to envision the evidentiary conundra that could arise from changes in scientific notions without concomitant technologies of proof. The statute seems to reflect an encompassing view of pregnancy from the moment of conception in the language of section one, that prohibits intervention in regard to "any woman pregnant with child, whether such child be quick or not." An Act to Punish Criminal Abortion, 1883 Tenn. Pub. Acts ch. 140, § 1, at 188 (Act of March 23, 1883). However, matters

invented other means of testing for pregnancy⁴⁷⁷ or as embryology changed the meanings attached to “conception” and redefined *in utero* processes.⁴⁷⁸ Other jurisdictions did not require the prosecution prove a woman was pregnant,⁴⁷⁹ only that those involved thought she was⁴⁸⁰ (in other words, criminalizing attempt regardless of actual pregnancy).⁴⁸¹

If an abortion had taken place or been attempted, the second threshold matter of proof regarding whether the exception applies is whether the procedure was medically necessary. Some states required a defendant to prove medical necessity⁴⁸² and erected presumptions that had to be overcome in that proof.⁴⁸³ Others laid on the state the burden of proving that an abortion was *not* medically

of proof are complicated when that section requires that the act be conducted “with intent to destroy such child *and* shall thereby destroy such child.” *Id.* (emphasis added). It is difficult to imagine, in the decades before a pregnancy test, that much short of a recognizably formed fetus could have sufficed as proof for such a charge. The next section of the statute employs yet different language to refer to pregnancy (as it provides lesser punishment for attempt), referring to intervening “with the intent to procure the miscarriage [*sic*] of a woman then being with child.” An Act to Punish Criminal Abortion, 1883 Tenn. Pub. Acts ch. 140, § 2, at 188 (Act of March 23, 1883).

477. See *supra* text accompanying note 28 (describing pregnancy test development).

478. See, e.g., *Mills v. Commonwealth*, 13 Pa. 631, 633 (1850) (holding quickening is immaterial, pregnancy at any time after “[t]he moment the womb is instinct with embryo life” and intentional miscarriage are sufficient). A Hawaii court re-cites the *Mills* rule nearly a century later, attesting to the durability of the new sensibility it reflects. *Territory of Haw. v. Young*, 37 Haw. 150, 159–60 (1945).

479. See, e.g., 1935 Cal. Stat. 51st Sess., Amendment to Penal Code ch. 528 (codified as 1 CAL. PENAL CODE pt. 1, tit. 9, ch. 3, § 274 (1935) (amending California Penal Code, pt. 1, tit. 9, ch. 3, § 274 (1872), to remove stipulation that woman be “pregnant” from prior abortion restriction); see also *Rinker v. State Bd. of Medical Examiners*, 138 P.2d 403 (Cal. Dist. Ct. App. 1943) (state need not prove actual pregnancy).

480. See, e.g., *Barrow v. State*, 48 S.E. 950, 951 (Ga. 1904) (sufficient to prove intent to destroy fetus without proving quickening); see also *People v. Kellner*, 52 N.Y.S. 2d 355, 356 (NY Sup. Ct. 1945) (state need not prove pregnancy but must prove defendant’s intent to cause miscarriage); see also *Commonwealth v. Trombetta*, 200 A. 487, 489 (Pa. Super. Ct. 1938); *Commonwealth v. Sierakowski*, 35 A.2d 790, 792 (Pa. Super. Ct. 1944) (prosecution need only establish use of a means to procure miscarriage and intention to do so).

481. For some courts, even proof at trial that a woman had not, indeed, been pregnant, did not defeat a criminal charge stemming from attempted abortion if the accused had thought her pregnant. See, e.g., *Wilson v. Commissioner*, 60 S.W. 400, 401–03 (Ky. Ct. App. 1901) (though no actual abortion and woman’s death due to other causes, finding defendant who had killed woman in attempt to produce abortion—because his acts had “endangered her life” and, even if false, he believed her pregnant by him—sufficient to support manslaughter charge).

482. See, e.g., *Adams v. State*, 88 A.2d 556 (Md. 1951) (defendant must show necessity); *People v. Hammer*, 186 N.Y. Supp. 132 (1921); *People v. McGonegal*, 17 N.Y. Supp. 147 (Sup. Ct. 1891) (*cited in* *State v. Wells*, 100 P. 681, 683–84 (Utah 1909)); *People v. Meyers*, 5 N.Y. Crim. 120 (Sup. Ct.), *aff’d* 107 N.Y. 671, 14 N.E. 608 (1887) (*cited in* N.Y. ABORTION LAW § 1142 (McKinney 1916); *Weed v. People*, 3 Th. & C. 50 (Sup. Ct.), *aff’d* 56 N.Y. 628 (1874); *Bradford v. People*, 20 Hun. 309 (N.Y. Sup. Ct. 1880) (*cited in* *People v. Hammer*, 186 N.Y. Supp. 132, 134 (1932)); see also George, *Current Abortion Laws*, *supra* note 170, at 377–78 (discussing “necessity” in state abortion statutes circa 1965).

483. See, e.g., *Holloway v. State*, 82 S.E. 2d 235, 236 (Ga. Ct. App. 1954); *Guiffrida v. State*, 7 S.E. 2d 34, 34 (Ga. Ct. App. 1940) (evidence that woman was healthy, co-present with plausible motivations such as to avoid disgrace, sufficient to defeat asserted life exception); see also *Grecu v. State*, 12 N.E.2d 179, 181 (Ind. 1954) (testimony of woman that she was “perfectly well” or felt “perfectly healthy” up to procedure defeats life defense). But see *State v. Stillman*, 301 S.W.2d 830, 831 (Mo. 1957) (good health of woman prior to abortion means only that she was capable of carrying child to term).

necessary.⁴⁸⁴ The robustness of the exception (or defensibility of having conducted an abortion) often turned on technical matters of proof, and that was inconsistent across jurisdictions.

Third-wave statutes, by repeating existing formulations from prior legal authorities, preserved the common-law therapeutic exception at the same time that the meaning of “health” itself was undergoing wholesale redefinition. The next Section discusses the implications of this changed milieu.

C. HEALTH, REDEFINED

1. The Century of Surgery

Several largely unrelated new developments—the rise of surgery, the implications of embryology—worked in conjunction to reconfigure thinking about health, life, and abortion in fundamental ways. Prior to the last third of the nineteenth century, surgery had been a fearful prospect for patient (and practitioner); for example, the absence of anesthesia necessitated rigorous physical restraint of the patient and cutting into a live, unsedated patient was not for the weak of will.⁴⁸⁵ Even so, by mid-nineteenth century, intrusive measures disfavored in humoral gynecology⁴⁸⁶ had become more common.⁴⁸⁷ In gynecology, surgeons and obstetricians increasingly employed the “curette,” a surgical instrument shaped like a small scoop (previously used primarily for removing

484. *See generally*, *People v. Long*, 103 P.2d 969, *cert. denied* 311 U.S. 698 (Cal. 1940) (state bears burden of proving abortion was not necessary to save woman’s life); *State v. Rowley*, 248 N.W. 340 (Iowa 1933) and *State v. Snyder*, 59 N.W. 2d 223 (1953) (state bears burden of proving abortion not necessary to save woman’s life); *State v. Hawkins*, 210 S.W. 4, 7 (Mo. 1919); *State v. Wells*, 100 P. 681 (1909) (prosecution must prove abortion not necessary). Courts of the Commonwealth interpreting the British statute likewise put the burden of proof on the prosecution. *See, e.g.*, *In re McCready*, 4 C.C.C. 481, 485 (1909)) (Canadian judge refuses extradition to face criminal abortion charge on the grounds that state fails to meet burden of proof that the operation was not necessary to preserve the woman’s life), *cited in* KEOWN, ABORTION, DOCTORS, AND THE LAW, *supra* note 38, at 52, 182 n.22. *But see* MICH. COMP. LAWS ANN. § 14 (West 1935) (statutory provision excusing prosecution from proving medical necessity had not existed).

485. SAMUEL COOPER, *DICTIONARY OF PRACTICAL SURGERY* 196 (2d. ed., 1816)) (describing physical restraints advisable when performing mastectomy in the time before anesthesia), *cited in* Garfinkel, *Quaker Woman’s Breast Cancer Surgery*, *supra* note 339, at 74.

486. *See supra* Part I.C.

487. *See supra* Part II.C. To be clear, though disfavored, intrusive techniques are attested in Western gynecology back to antiquity. *See generally* J.H. YOUNG, *CAESARIAN SECTION: THE HISTORY AND DEVELOPMENT OF THE OPERATION FROM THE EARLIEST TIMES* (1944) (reporting the history of the use of Caesarian section and the belief systems informing its techniques from antiquity through mid-twentieth century, with later materials concentrating on England); *see also, generally*, RENATE BLUMENFELD-KOSINSKI, *NOT OF WOMAN BORN: REPRESENTATIONS OF CAESAREAN BIRTH IN MEDIEVAL AND RENAISSANCE CULTURE* (1990) (documenting illustrations of Caesarian birth in medieval manuscripts). The name does not itself extend back to Caesar’s time; rather *opération césarienne* comes only in the sixteenth century. *See* Monica H. Green, *Renate Blumenfeld-Kosinski, Not of Woman Born: Representations of Caesarean Birth in Medieval and Renaissance Culture*, 67 *SPECULUM* 380, 380 (1992) (book review).

cataracts or earwax)⁴⁸⁸ to scrape the lining of the uterus⁴⁸⁹ as an abortion procedure.⁴⁹⁰ They were also increasingly prone to undertake amniotic piercing, to resort to the more painful and risky fetal extraction hook, or to attempt fetal removal by Caesarian section.⁴⁹¹ After the middle decades of the nineteenth century, discoveries such as inhaled-gas anesthesia⁴⁹² and sepsis-prevention measures⁴⁹³ decreased mortality in all types of surgery. Magdalena Biernacka suggests that invention became the mother of necessity: breakthroughs enabling surgical solutions spurred a search for anatomical problems for surgery to solve.⁴⁹⁴ Although in hindsight, writers like Jacalyn Duffin call 1870 to 1970 the “Century of Surgery,” a time of “unbounded optimism” towards the treatment potential offered by surgery,⁴⁹⁵ on its eve, we detect considerable wariness.⁴⁹⁶

Regarding those therapeutics for which humoral practice had distinguished emmenagogues from abortifacients, it had done so by diagnosis and by treatment intent, marked in part by timing. In locational medicine, quickening remained helpful as a diagnostic for ascertaining pregnancy and alerting patient and

488. *Curette*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) [hereinafter “OED”]. The entry of the word “curette” into English is first attested in 1739 in HENRI FRANCOIS LE DRAN, OBSERVATIONS IN SURGERY lxxvii 271 (trans. John Sparrow, 1st ed. 1739), cited in OED.

489. For the earliest published description of such usage currently known, see OED (citing W.J. Smyly, M.D., *The Diagnosis and Treatment of Diseases of the Endometrium*, 1 BRIT. MED. J. 288 (Feb. 11, 1888)).

490. See, e.g., Dr. Aleck Bourne’s response to a plea for help from the parents of a fourteen-year-old impregnated by rape, “I shall be delighted to take her in at St. Mary’s and curette her.” KEOWN, ABORTION, DOCTORS, AND THE LAW, *supra* note 38, at 49 (citing *Charge of Procuring Abortion (in Rex v. Bourne)*).

491. MOHR, ABORTION IN AMERICA, *supra* note 22, at 14.

492. Georgia surgeon Crawford Long experimented with, but abandoned after public outcry, use of ether during surgery. BROWDER, ABORTIONIST, *supra* note 347. October 16, 1846, dentist W.T. Morton, who had used ether on patients in tooth extraction, demonstrated the vapor of sulfuric or diethyl ether to prevent pain of surgery. PERNICK, CALCULUS OF SUFFERING, *supra* note 337, at 3. Administered to Gilbert Abbott, upon whom surgeon John Collins operated to remove a neck tumor, this well-publicized case was used to promote use of inhaled gas anesthesia in surgery. DUFFIN, HISTORY OF MEDICINE, *supra* note 328, at 262. In 1847, Scotsman James Young Simpson introduces chloroform into surgical practice; he recommends it for obstetrics. *Id.*

493. The Listers developed antiseptics in 1867. See *supra* note 31. However, surgical wounds—unlike, say, open fractures—were presumed “clean” and preventive asepsis to avoid wound contamination in surgery was not employed until Ernst von Bergmann introduces it in 1877. DUFFIN, HISTORY OF MEDICINE, *supra* note 328, at 263.

494. Magdalena Biernacka, *History of Visceroptosis*, unpublished manuscript presented at Annual Meeting of the Royal College of Physicians and Surgeons Canada (Sept. 26–29, 1996) (abstract published in 19 CLINICAL INVESTIGATIVE MED. SUPP. 1 (Aug. 1996) (pointing to “visceroptosis,” or “drooping abdomen,” as an example), cited in JACALYN DUFFIN, LOVERS AND LIVERS: DISEASE CONCEPTS IN HISTORY (2005), at 135 n. 16.

495. DUFFIN, HISTORY OF MEDICINE, *supra* note 328, at 266. Kristin Luker refers to the period between 1890–1950, for the absence of public discussion of abortion, as “the Century of Silence.” See LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD, *supra* note 22, at 40–65.

496. See, e.g., *supra* Part II.C (describing a “second wave” of legislation regulating abortion inspired by tabloid reporting of patient death from intrusive abortion).

practitioner to a time of heightened danger for intervention.⁴⁹⁷ However, as embryology became common knowledge, it challenged belief in quickening as a beginning to human life.⁴⁹⁸ This extended conceptualization of an act as “abortion” back to the earliest days of pregnancy: as a conceptual category, “abortion” gained ground against “emmenagogue.” A humoral theory of health that had provided the epistemological and ethical structures for emmenagogic work also faded. The category of “emmenagogues” waned in consciousness and the administration of emmenagogic substances became more susceptible to being equated with birth control.

Together, over the long twentieth century, the collapsing category of “emmenagogues,” leaving all intervention conceptualized as “abortion,” and the rise of intrusive measures in prominence and in practice, increasingly made intervention under conditions of amenorrhea in a woman of menstruating age synonymous with abortion; and abortion, with intrusive techniques.

2. Growing Gap Between “Life” and “Health”

In medieval and early modern gynecological practice, acts to protect a woman’s “health” were inseparable from acts to preserve her “life.” In serious matters, “health” was subsumed under the more encompassing category of “life,” and at law, a “life exception” encompassed a “health exception.”⁴⁹⁹

However, by the long twentieth century, a gap began to appear between “life” and “health.” Under humoral theory, a patient could not be characterized as “healthy” if she did not have the four humors in balance, and neither could life be sustained: humoral imbalance caused life-threatening disease. Under a locational theory of health, however, diseased organs or parts can be considered discretely from the whole. A patient with a “heart condition” can take medication for “heart disease” but be considered “otherwise healthy.” Under holistic conceptions of health, there is no “otherwise.” As a practical matter as well, treatments developed under locational theories increasingly allowed for the possibility of preserving life under conditions of “wrecked health.” As a conceptual matter, a gap appeared between “life” and “health”; as a practical matter, empirical-science breakthroughs amplified that gap.

The language of the therapeutic exception in state abortion statutes began to reflect that gap. Modifications to standard provisions may have been subtle but their inception quietly marks the bigger revolution going on in health epistemol-

497. The pregnancy test was not invented until the late 1920s. See Harry E. Kaplan, M.D., *The Aschheim-Zondek Hormone Test for Pregnancy*, 31 CAL. & W. MED. 412, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1657279/?page=1>. See generally *supra* note 28.

498. Siegel, *Reasoning from the Body*, *supra* note 279, at 287–92 (discussing “quickening”).

499. See *supra* Part I.D.4.b. (arguing that the common-law “life exception” be understood in practical terms as a “life-health exception”).

ogy and practice. Illinois first altered the formula in 1867.⁵⁰⁰ Whereas the previous standard formula of the explicit life-health exception permitted practices necessary to “preserve the woman’s life,” the Illinois statute permitted abortion for “bona fide medical and surgical purposes.”⁵⁰¹ Maryland statute, passed in 1868, allowed abortion when the fetus was dead or when no other method of treatment “will secure the safety of the mother.”⁵⁰² Colorado statute of the same year worded its exception to permit intervention to “save the life” or to “prevent bodily injury” to the patient.⁵⁰³ (New Mexico in 1953 repeated similar language, permitting intervention to “preserve life” or “prevent permanent bodily injury” to the patient.⁵⁰⁴) Finally, the District of Columbia introduced the term “health” itself with a 1901 provision that permitted intervention to save the “life and health” of the patient.⁵⁰⁵ Case law in various jurisdictions followed suit, for example a Massachusetts court’s allowance that the law permits abortion to “preserve maternal life and protect maternal health.”⁵⁰⁶ Alabama statute of 1951 explicitly added “health” to its life exception.⁵⁰⁷ A 1956 New Jersey case permitted abortion to avoid death or “permanent, serious injury” to the mother.⁵⁰⁸ In 1959, the same year as the publication of the Model Penal Code, a California court acknowledged changes in medical knowledge that allowed a practitioner to separate saving life from preserving health and further, to recognize conditions that might be lethally exacerbated by pregnancy without entailing the emergency, say, of fatal complications during childbirth. Peril to life need not be “imminent” to meet the statutory “life exception,” the court noted.⁵⁰⁹ Acknowledging a gap between “health” and “life” did not come without ambivalence, nor did “health” always survive its disentanglement from “life.” A 1948 New Jersey case, for example, warned that a doctor can perform an abortion to save the life of a woman but not “merely” her health.⁵¹⁰

3. “Health” Narrowed and Expanded

The separation of “life” from “health” had the potential to narrow the grounds for medically justifiable intervention. Abandoning humoral health theory, in

500. An Act to amend the criminal code of this state in relation to the offense of abortion, 1867 Ill. Pub. Laws 1st Sess. 89 (Act of Feb. 28, 1867).

501. *Id.*

502. 1868 Md. Laws ch. 179, § 2, at 315.

503. COLO. REV. STAT. § 12-4-42 (1868).

504. N.M. STAT. ANN. § 40A-5-2 (1963).

505. D.C. CODE 31 Stat. 1322 (1901).

506. *Commonwealth v. Wheeler*, 53 N.E.2d 4 (Mass. 1944).

507. ALA. CODE tit. 14, § 9 (1959), *discussed in* George, *Current Abortion Laws*, *supra* note 170, at 378 (discussing statutes that permits abortion to “protect the health of the mother”).

508. *State v. Siciliano*, 121 A.2d 490 (N.J. 1956).

509. *People v. Ballard*, 335 P.2d 204 (Cal. Dist. Ct. App. 1959) (peril to woman’s life need not be “imminent” to justify abortion under statutory standard of necessity).

510. *State v. Brandeburg*, 58 A.2d 709, 710–11 (N.J. 1948) (doctor can act to “save the life” of a woman but not “merely to protect her health”).

practice, removed the most common health-based justifications for administering those uterine purgatives that had previously been so commonly prescribed and reduced the number of disease conditions that might be treated with abortifacients in the name of health rather than in the name of ending pregnancy.⁵¹¹

As reliance on medical professionals' judgment of abortion necessity and legality grew over the "long twentieth century," however, an unexpected development occurred: instead of only narrowing "medical necessity" to more restricted and technical grounds, medical experts in two respects expanded it. First, using rationale akin to that of the new science of sociology, some experts began to reinsert the patient into context, now conceptualized as "socioeconomic" context.⁵¹² Informed by the emerging field of "public health," medical experts began to see poverty as a cause of disease and ill-health.⁵¹³ They scrutinized economic opportunity as part of campaigns to ameliorate the conditions that cause ill health. A new idiom entered into discussion of "therapeutic abortion" (that is, abortion the legality of which rests on the health exception): "social indications" for abortion,⁵¹⁴ one of which was poverty.⁵¹⁵

Second, as an earlier belief in "temperament"—related to the balance of humors in a person—waned, a new theory related to "the psyche" arose⁵¹⁶ and a new term, "mental health," entered the practitioner lexicon. The formalization of the discipline of psychiatry in the U.S. paralleled that of medicine, with its early luminaries educated abroad⁵¹⁷ and institutionalization accelerating in the short nineteenth century. The founding of the American Psychiatric Association in

511. See *supra* note 19 (giving sources that discuss medical indication for abortion, at least from the perspective of medicine in the first half of the twentieth century).

512. See REAGAN, WHEN ABORTION WAS A CRIME, *supra* note 22, at 139 (explaining Dr. A.J. Rongy's argument that most physicians already took "social necessity" into consideration when deciding whether to perform an abortion); see also *id.* at 142–44 (on the expanding consideration physicians gave social factors in the 1930s).

513. See, e.g., *id.* at 132–36 (describing growing willingness by doctors during the Great Depression to admit that assessment of social conditions entered into medical judgment about the suitability of therapeutic abortion).

514. See *id.* at 61–65 (reporting doctor raising question about "social indication" for abortion in query to the *Journal of the American Medical Association*); see also *id.* at 181 (on physician advocates for socially indicated therapeutic abortion in the 1950s).

515. See *id.* at 65 (reading between the lines of letters to the *Journal of the American Medical Association* to find poverty as a reason physicians provided abortion); *id.* at 144–45 (on Dr. Frederick J. Taussig's late 1930s arguments that indications for therapeutic abortion include poverty, hunger, pre-existing family size in relation to family income).

516. Previous psychiatric theory had attempted to fit observations of "insanity" into humoral schema of theories of health and treatment. See, e.g., MASON COX, PRACTICAL OBSERVATIONS ON INSANITY (1804) (proposing too much blood in the brain is the cause of all mental disease and purgation is the cure), cited in GREGORY ZILBOORG (IN COLLABORATION WITH GEORGE W. HENRY), A HISTORY OF MEDICAL PSYCHOLOGY 411 (1941) [hereinafter ZILBOORG, HISTORY OF MEDICAL PSYCHOLOGY].

517. See, e.g., BENJAMIN RUSH, MEDICAL INQUIRIES AND OBSERVATIONS UPON DISEASES OF THE MIND (1812) (Rush's first American textbook on psychiatry); JOHN REVERE, DISPUTATIO MEDICA INAUGURALIS DE INSANIA (1811) (son of Paul Revere, John Revere's, doctoral thesis in medicine at the University of Edinburgh).

1844⁵¹⁸ and Dorothea Dix's post-Civil War campaign for specialized treatment hospitals⁵¹⁹ helped to establish psychiatry as part of the emerging medical mainstream. Some psychiatric diagnoses were given equal weight with other medical conditions in the eyes of the law. One category of such analysis was abortion. Protecting "mental health" was increasingly invoked as a justification for abortion under the statutory health exception.⁵²⁰ By the end of the long twentieth century, regulars' journals debated "medical indications" for abortion,⁵²¹ including the psychotherapeutic.⁵²²

In this, U.K. law took a trajectory that U.S. law followed. U.K. statute ostensibly prohibited abortion except where necessary to save a woman's "life."⁵²³ In the watershed case identifying the place of mental health in interpreting the life-health exception, *Rex v. Bourne*, a 1938 abortion prosecution, the defense made no assertion that the patient, a fourteen-year-old impregnated through rape, faced danger to her physical "life" if pregnancy continued. The physician defendant testified that his decision to curette was based on the threat to the patient of "mental and nervous injury."⁵²⁴ Under cross-examination, he denied a clear distinction between danger to life and to health.⁵²⁵ This was no resurrection of the old life-health exception, however, but its reconceptualization on new grounds: the defense argued here that because of "mental and nervous

518. ZILBOORG, HISTORY OF MEDICAL PSYCHOLOGY, *supra* note 516, at 410–11 (describing the founding of the American Psychiatric Association, actually predating the A.M.A. by three years, in the context of the development of the field of psychiatry internationally).

519. See generally FRANCIS TIFFANY, LIFE OF DOROTHEA LYNDE DIX (1891); see also ALBERT DEUTSCH, THE MENTALLY ILL IN AMERICA, ch. 9 (1937) (reporting her achievements).

520. As evidence of the rising acceptance of "psychiatric indications" for therapeutic abortion in the 1940s and 1950s, studies show in 1947 one-fifth of all therapeutic abortions were granted on psychiatric grounds, a proportion that grew to one-half of all therapeutic abortions by 1960. REAGAN, WHEN ABORTION WAS A CRIME, *supra* note 22, at 201–03.

521. See, e.g., REAGAN, WHEN ABORTION WAS A CRIME, *supra* note 22, at 278 n.55, 279 n.57 (1997) (citing E.C. McKee, *Abortion*, AM. J. OBSTETRICS 1333–34 (1891); W.C. Bowers, *Justifiable Artificial Abortion and Induced Premature Labor*, J. AM. MED. ASSOC. 568–569 (1899); Frank A. Higgins, *The Propriety, Indications and Methods for the Termination of Pregnancy*, 43 J. AM. MED. ASSOC. 1531–33 (1904); Paul Titus, *A Statistical Study of a Series of Abortions Occurring in the Obstetrical Department of the Johns Hopkins Hospital*, 65 AM. J. OBSTETRICS 960 (1912); Irving K. Perlmutter, *Analysis of Therapeutic Abortions, Bellevue Hospital 1935–1945*, 53 AM. J. OBSTETRICS & GYNECOLOGY 1012 (1947)).

522. See, e.g., *Is Abortion Justifiable in the Insane Pregnant?*, 38 J. AM. MED. ASSOC. 69 (1902); R. Finely Gayle, *The Psychiatric Consideration of Abortion*, 91 S. MED. AND SURG. 251 (1929), cited in REAGAN, WHEN ABORTION WAS A CRIME, *supra* note 22, at 279 n.59 (1997); see also Harold Rosen, *Psychiatric Implications of Abortion: A Case Study in Social Hypocrisy*, 17 W. RES. L. REV. 435 (1965); Richard A. Schwartz, *Abortion on Request: The Psychiatric Implications*, 23 CASE W. L. REV. 840 (1971–72).

523. See *supra* text accompanying notes 265–292 (explaining Lord Ellenborough's Act, the fate of its abortion provisions in successor legislation, and its interpretation in U.K. courts); see also generally KEOWN, ABORTION, DOCTORS, AND THE LAW, *supra* note 38.

524. *Charge of Procuring Abortion*, 2 BRIT. MED. J. 97 (1939), cited in KEOWN, ABORTION, DOCTORS, AND THE LAW, *supra* note 38, at 50.

525. *Id.*

injury,” health could become so compromised that it would shorten life.⁵²⁶ The prosecution argued a bright-line distinction between saving life and preserving health⁵²⁷ and queried the lawfulness of abortion in regard to the latter,⁵²⁸ especially to mitigate a possible threat to mental health.⁵²⁹ In jury instructions, the judge clarified that a doctor need not wait until a patient was in immediate danger but was duty-bound to operate if pregnancy threatened life.⁵³⁰ He further told the jury that “life depends on health, and it may be that health is so gravely impaired that death results.”⁵³¹ Statutory provision permitting abortion for “the preservation of life” was to be construed in a “reasonable sense”: if a doctor thought “the probable consequence of continuation of the pregnancy will be to make the woman a physical or mental wreck,” the jury was entitled to find that the doctor operated for the purpose of preserving the life of the mother.⁵³²

The approach in *Rex v. Bourne* illustrates a few matters intrinsic to the development of the life-health exception. First, by 1938, life and health were becoming disentangled. Second, some courts, as in *Bourne*, reasoned that the threat to life and grounds for invoking the “life” defense need not be restricted to birthing emergency and its immediate temporality.⁵³³ A threat to health over the long term could make a person a “wreck” and ruin her life or tempt her to end it. Third, as with the old life-health exception, the “life” exception included defense of health, but here, “health” included mental health.

Over the long twentieth century, the emergence of “mental health” benefitted the therapeutic exception at a time when life and health were increasingly disentangled in abortion practice, which could have left the rationale of a health exception particularly vulnerable to erosion. Intrusive measures had become less deadly to women. Further, with the switch from humoral health, in other situations there were ways to save life that might not necessarily preserve “full health.” In other words, a gap had appeared between “saving life” and “saving health” in twentieth-century gynecology. Into this doctrinal gap, at law the meaning of “health” expanded along two dimensions. Between 1940 and 1959, sociologically informed ideas of health and lifespan, as well as psychologically

526. *Id.*

527. *Id.*

528. *Id.* at 50–51 (in *Rex v. Bourne*, Attorney-General conceded that if necessary to save the life of the mother, induced or forcible miscarriage is not “unlawful”).

529. THE TIMES, July 20, 1938, cited in KEOWN, ABORTION, DOCTORS, AND THE LAW, *supra* note 38, at 50, 182 n.8.

530. *Rex v. Bourne*, 1 K.B. 687, 693 (1939), cited in KEOWN, ABORTION, DOCTORS, AND THE LAW, *supra* note 38, at 182 n.14.

531. *Id.* at 692.

532. *Id.* at 694.

533. See *People v. Ballard*, 167 Cal. App. 2d 803, 335 P.2d 204 (Dist. Ct. App. 1959) (peril to woman’s life need not be “imminent” to justify abortion under statutory standard of necessity); see also, e.g., *R v. Bell* [1929], 1 BRIT. MED. J. 1061 (in case of patient whose obesity made pregnancy increasingly risky, judge states certain operations to terminate pregnancy in its last stages to save patient’s are legal and necessary), cited in KEOWN, ABORTION, DOCTORS, AND THE LAW, *supra* note 38, at 182 n.27.

informed ideas of mental health, entered into decisions about medical necessity.

With the medicalization of legal doctrine, control over abortion that was first concentrated in physicians passed increasingly to hospitals. Hospitals set up therapeutic abortion review boards to weigh the medical justification of abortion in a particular case.⁵³⁴ A woman's wish to terminate pregnancy became subject to scrutiny by teams of strangers, mostly men.⁵³⁵ When the American Law Institute (ALI) proposed a model penal code section on abortion in 1959, it repeated the old New York formula of requiring that two physicians consult on the medical necessity of the procedure.⁵³⁶ However, following a few state courts, the ALI defined the life/health exception to include "substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother."⁵³⁷ The M.P.C. ushered in a new wave of statutory reform and intensified anxiety, action, and discourse until *Roe v. Wade*.

4. Health Lost

In parallel and overshadowed by overt developments, another great transformation took place over the course of the long twentieth century: the loss of two millenia of practical knowledge of emmenagogic and abortifacient recipes and procedures. The practice of early-term potional abortion in the name of "restoring menses," no longer justified by outmoded humoral theories, fell out of practitioners' repertoire. With the disappearance of humoral theory, practice—even by many irregulars—shifted to new grounds. Changes in practice disrupted established patterns for transmitting knowledge, through texts and oral tradition. Knowledge of abortifacients was dropped from translation⁵³⁸ and suppressed.⁵³⁹ The period from 1857 to 1959 was marked by the near extinction of an enormous body of knowledge and practice in abortion.

Abortion increasingly came to mean uterine intrusion or surgery, not only because of a shift in medical practice from irregulars to regulars but also from the evaporation of a humoral theory that explained disease in a way that justified, even demanded, emmenagogic and abortive purgations. In other words, by our time of

534. For accounts of how the hospital review boards worked, see, e.g., HAROLD ROSEN, THERAPEUTIC ABORTION: MEDICAL, PSYCHIATRIC, ANTHROPOLOGICAL, AND RELIGIOUS CONSIDERATIONS (1954); see also Alan Guttmacher, *The Genesis of Liberalized Abortion in New York: A Personal Insight*, 23 CASE W. L. REV. 756 (1971–72); REAGAN, WHEN ABORTION WAS A CRIME, *supra* note 22, at 173–79, 214 (describing the work and institutionalization of hospital "therapeutic abortion" review committees).

535. For a description of this aspect of the work of hospital abortion committees, see Rickie Sollinger, "A Complete Disaster": *Abortion and the Politics of Hospital Abortion Committees, 1950–1970*, in LEAVITT, WOMEN AND HEALTH *supra* note 144, at 659, 664–68.

536. MODEL PENAL CODE § 230.3(3) (1959), in ROSE, ABORTION DOCUMENTARY GUIDE, *supra* note 25, at 38.

537. § 230.3(2) (1959), in ROSE, ABORTION DOCUMENTARY GUIDE, *supra* note 25, at 38.

538. See RIDDLE, ANCIENT ABORTION, *supra* note 33, at 160–66 (describing, e.g., abortion knowledge edited out of nineteenth- and twentieth-century English translations of humoral works).

539. See Tine M. Gammeltoft and Ayo Wahlberg, *Selective Reproduction Technologies*, 43 ANN. REV. ANTHROPOLOGY 201 (2014) (including knowledge suppressed in translation from colonies to England).

post-*Roe* thinking, “abortion” had become equated with intrusive measures and surgery not only because doctors forced out midwives,⁵⁴⁰ but also because a conceptualization of health that had supported alternative procedures disappeared.

CONCLUSION

Understanding practices and conceptions of health particular to past times exposes a history of the “health exception” often otherwise obscured. For most of its history, Anglo-American law regulated abortion differentially by practice.⁵⁴¹ In its earliest iterations, the law permitted without comment potional abortion, and disfavored practices most dangerous to the patient—“poison,” abortion by blows, and internal intrusion—and interventions at times most dangerous to the patient, *i.e.*, after “quickening.”⁵⁴²

The antecedents of abortion regulation also encoded intent. Curative intent could be construed in regard to treating either retained menses or responding to perilous pregnancy. Liability attached under a very limited circumstance: in the case of patient death, from a post-quickening procedure, if intent had been to destroy a fetus rather than to cure or save a patient.⁵⁴³ If a practitioner administered an emmenagogue, a “constructive health exception” excluded liability for unintended patient death.⁵⁴⁴ If a practitioner undertook a treatment understood to terminate pregnancy, a “life-health” defense provided a shield from liability in most cases of unintended patient death.⁵⁴⁵ Statutory provisions regarding “lawful” and “unlawful” abortion depended on curative intent to distinguish legality.⁵⁴⁶

The contours of this doctrine survived, even as fundamental understandings of health changed,⁵⁴⁷ preserved in legality distinctions and in life-health exceptions to restrictions imposed by statute.⁵⁴⁸ However, aside from new ideas about socioeconomic health effects and mental health impairments from unwanted pregnancies and births, conceptions of “health” became steadily less holistic, and the grounds for invoking medical necessity became ever narrower through the twentieth century.⁵⁴⁹ The “health exception” doctrine of today represents continuity with doctrines of the past, enjoying centuries-old antecedents. What is

540. See generally MOHR, ABORTION IN AMERICA, *supra* note 22.

541. See *supra* Part I.D.

542. See *supra* Part I.D.2.

543. See *supra* Part I.D.3.

544. See *supra* Part I.D.4.

545. See *supra* Part I.D.4.

546. See *supra* Part II.D.

547. See *supra* Part II.A–C.

548. See *supra* Part II.D.

549. See *supra* Part III.

novel are the narrowed grounds on which patients, practitioners, and lawmakers may now invoke it.

Debates over “life,” and changes to contraception and abortion practice, receive more attention than health epistemologies nowadays. However, if the past is anything to judge by, changes to our conception of health—though less conscious and more difficult to detect—may prove the more dispositive part of the equation for the future of the “health exception.”